

Listening to the Silence - Sensing the Noise
**The Practice of Victim Participation at the International
Criminal Court**

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Introduction: From absence to presence, from silence to voice?

The story of victims of mass atrocities and their role within international criminal proceedings is told as a path from absence to presence, from silence to voice (Karstedt 2010). Starting at Nuremberg, which is commonly described as the origin of institutionalized international criminal justice, where the victims of the tried crimes hardly played any role, through a recognition of victims' rights to truth, justice and reparations in human rights law, up to the recognition of respective procedural rights, granting victims participatory status in international criminal proceedings at the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and Kosovo and the International Criminal Court (ICC). Victim participation was celebrated as a milestone in the acknowledgement of victims as stakeholders in transitional justice processes. Following a therapeutic ethic (Robins 2012) which was attributed to the general transitional justice narratives, truth, and truth-telling are described as having a healing effect for victims, and for societies as a whole (Colvin 2006). Accordingly, truth-telling and the establishment of an official historical record was said to have a reconciling function both for individuals and collectivities. Against this backdrop, courts were criticized for silencing victims and being counter-productive within the transitional justice context, striving for the restoration of peace and justice in war-torn societies. In this vein, the alleged retributive rationale of international criminal courts was scrutinized and a more restorative approach propagated (Findlay and Henham 2005; Musila 2010). That way, the therapeutic ethic was introduced into the international criminal justice narratives, as it was assumed, that truth-telling through testimony and having a voice in the criminal legal proceedings can contribute to the healing process. The victims are said to re-gain their dignity by participating actively, because they are recognized as subjects in the proceedings. Within this narrative framework, the introduction of victim participation at the ICC was accompanied by a lot of expectations and hopes. The participatory framework is said to introduce restorative justice elements into the otherwise retributive proceedings. According to the Revised Strategy in Relation to

Victims, “[T]he Court was created with both a punitive and restorative function, with the Rome Statute giving victims a right to directly participate in proceedings.”¹

Now, after 15 years since its inception, and after years of “almost romantic enthusiasm”, the ICC is “going through turbulent times” (Clarke et al. 2016, p. 1). There is ample criticism concerning, among other “issues facing the ICC” (Steinberg 2016), the implementation of the victim participation framework and the prosecutorial strategy towards African States. With regard to victim participation it is increasingly argued that the developments in the organization of legal representation lead to the bureaucratization of participation and this in turn resulted in a marginalization of the participants (Hébert-Dolbec 2015). And that the abstract victims are referred to as a constituency legitimizing international criminal law, while the juridification of victimhood narrows the number of actually participating victims to strictly legally relevant ones (Kendall and Nouwen 2013; Fletcher 2015). Furthermore, the claim that victim participation meets out restorative justice aspirations is scrutinized given the actual practical implementation of the legal framework (Garbett 2017). At the same time, victim participation is still valued for “[V]ictims, at least some of them, are able to exercise some form of legal agency through their legal representatives...” (Killean and Moffett 2017, p. 740) Those who still generally support the institution of victim participation at the ICC criticize that the participants are reduced to being: “statistical Victims” within the organization of participation and demand a re-consideration towards more inclusionary practices in its implementation (Haslam and Edmunds 2017). Accordingly, victim participation is supposed to be meaningful to those who participate (Moffett 2015). Those who were more sceptical from the beginning claim that the restorative approach, participation is related to, is structurally incompatible with the retributive approach of international criminal law. Consequently, a “victim friendly” version of the ICC is argued to be the most effective option and the “restorative justice limb” should be abandoned (Vasiliev 2015, p. 5). In this context, at the Court, reform discussions are led. The victim participation system was reviewed “with a view to ensuring its sustainability, effectiveness and efficiency”, and a panel of nine independent experts

¹ Assembly of States Parties, International Criminal Court, Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims. ICC-ASP/12/41, 11 October 2013, para. 28 (hereafter: Assembly of States Parties, ICC-ASP/12/41).

concluded in 2013 that reforms were necessary in order to ensure that victims can “participate meaningfully”² The resulting Registry Re-Vision proposal suggests a streamlining of participation.³

Among academics and practitioners alike, the question if and how victims of the crimes tried are, and should be, present and have a voice within the proceedings is as controversial as ever. After a short period of uncritical celebration of the fact that the ICC started its work and the newly established institutionalization of victim participation, a phase of disillusion and re-consideration began.

In this phase, other general questions going to the very foundations of the ICC appear. Especially its relation to African States and the African Union (AU) is problematized. The AU and some African Head of States are criticizing that the ICC is unproportionally targeting African States, accusing the Court with a neo-colonial interventionist logic underlying its prosecutorial practice. This is discussed as a legitimacy crisis of the Court and one of the main contemporary issues facing the ICC (Smith 2009). Within the discussions, “the victims” are called upon, especially by the Prosecution, as a constituency legitimizing the interventions of the ICC:

“About targeting Africa: All the 32 people who are, or have been the subject of Summons, or Warrant of Arrest (public) are Africans. However there are also more than 5 million „African victim“s displaced, more than 40,000 „African victim“s killed, thousands of „African victim“s raped, and hundreds of thousands of African children transformed into killers and rapists. All victims are African. Is this not a factor to be considered? There are so many voices in this debate, but where are the voices of the victims? We must never forget our real constituency.”⁴

The “Victim issue” and the “African issue” are closely related and point to a deeper problematic of international criminal courts - their legitimizing constituency.

² ICC Registry, ReVision Project, Basic Outline of Proposal to establish Defence and Victims Offices (2014), p. 2.

³ ICC Registry, ReVision Project, Basic Outline of Proposal to establish Defence and Victims Offices (2014).

⁴ Batohli (2014, p. 50); similarly: “Millions of African victims’ fervent belief in an independent judicial mechanism that could curb these types of mass atrocities and their belief in this institution to bring justice to them remains as strong now as it was seventeen years ago when the Rome Statute was adopted. This is what gives the ICC legitimacy, not the wishes of a few select individuals who seek to shield themselves from the law by castigating the ICC ‘s legitimate efforts to end their impunity.’”, Bensouda, Fatou, The International Criminal Court and Africa: A Discussion on Legitimacy, Impunity, Selectivity, Fairness and Accountability, Keynote Address GIMPA Law Conference 2016, https://www.icccpi.int/iccdocs/otp/Keynote_Speech_of_the_Prosecutor-GIMPA_Law_Conference_on_the_ICC_and_Africa.pdf, last accessed 8/2/2018.

In this context, the ICC refers to “the victims” on whose behalf it allegedly operates and who are described as the beneficiaries of truth and justice produced by the Court. This led to the introduction of victim participation in the first place, because based on these legitimizing narratives, advocates could argue that “the victims” need to be present and to have a voice within the proceedings, otherwise the claim of truth and justice would just be symbolic. Now, in the context of the “Africa problem” (Clarke et al. 2016, p. 3), the “African victims” are again referred to as the legitimizing constituency. At the same time, the victim participation framework is harshly criticized for just not providing a space or giving a voice to participants within the proceedings. The discrepancy between legitimizing rhetoric and organizational reality then becomes particularly evident vis á vis the „African victim”. Where are the voices of the “African victims”, then?

Currently, this legitimacy gap is mostly approached independently from one another. Concerning the “Victim issue”, the argumentation is described above, either commentators demand a more inclusionary practice while acknowledging the organizational restraints. Or, they emphasise the effectiveness of the proceedings and argue that the ambitious goals initially attributed to victim participation have to be adjusted to the organizational realities. This leads to the narrowing of space and voice for participants in the proceedings. In the more recent past, empirical work within this field increased, still commentators state that there is not enough empirical research (Killean and Moffett 2017, p. 713; Edmunds and Haslam 2012, p. 871).

With regard to the “Africa issue”, one can distinguish between legalistic approaches, seeking solutions within the legal framework, rebutting the reproach of the AU, while at the same time urging the Prosecution to open cases in non-African situations to counter the unfavourable image (Werle and Vormbaum 2015; Werle et al. 2014; Mbizvo 2016). And approaches that analyse the relationship from an international relations and politics perspective (Vilmer 2016; Dersso 2016). It is clear that the opposition from African States and the AU undermines the ICC’s legitimacy and therefore poses a serious challenge (Ibid., p. 63).

In this dissertation, the relationship of the “Victim issue” and the “African issue” and the intertwinement with legitimizing claims will be addressed as an interrelated problematic of international criminal justice.

The first part (**Part I**) aims at conceptualizing the relationship of international criminal courts and “the victims” to then theoretically scrutinize the legitimizing function of “the victims” within international criminal justice narratives. Building on an eclectic selection of theoretical approaches an alternative reading of the legitimizing narratives is suggested in order to rethink the conception of presence and voice of the „African victims” within the proceedings at the ICC.

In **Chapter I** the, above mentioned, narrative from - absence to presence, from silence to voice - from Nuremberg to The Hague, is analysed. The aim is to carve out the narrative framing of the images of international criminal courts and the image of “the victim” respectively. The purpose is to contribute to a more nuanced and differentiated understanding of the interrelationship of international criminal courts and “the victims”.

The discrepancy between legitimizing rhetoric and organizational reality - is scrutinized more closely in **Chapter 2**. In order to refine the position of victims within international criminal justice, the general discussions on the purposes and objectives of international criminal proceedings are elaborated. This helps to differentiate the either/or logic of retributive vs. restorative justice prevailing in the discussions about victim participation and to determine the role of victims in the legitimizing narratives framing the ICC.

In **Chapter 3** the discrepancy between the theorization of international criminal law, the role of victims therein, and the empirical disillusion about the assumed effects is scrutinized from a critical theoretical perspective.

In the second part (**Part II**), the participatory and representational practices within the organization of victim participation at the ICC are reconstructed. Against the backdrop of the theoretical conceptions, the silencing effects inherent in representational practices are revealed and the exclusionary violence of the definitions of “the victims” scrutinized. I empirically trace the (im)possibilities of presence and voice within the practice of victim participation at the ICC.

Therefore, in **Chapter 4**, post-colonial methodological approaches are outlined that guide the empirical analysis of the practice of participation and representation. The questions I intend to answer are:

- Who is speaking for whom - who is speaking about whom, when are the modes of representation conflated and what does this imply within the practice of participation.

- How is the image of the victim and the court mutually reproduced within the organization of participation and representation?

- Which subject position of “the victim” is constituted within the practice of victim participation and representation. Which position do the participating victims have to assume to be heard within the legal framework? What is silenced through the representation of this subject position?

- Where are the gaps and irritations within the representational practices striving for truth, justice and closure? How does the resisting potential of (im)possibility manifest within the practice of participation?

Accordingly, in **Chapter 5** the legal framework of representation from the application phase to the allocation of legal representatives is reconstructed. Guided by the research questions, the framework of speaking and hearing is reconstructed and the silencing effects of representation are traced.

In **Chapter 6**, the definition of victims who are allowed to participate in the proceedings and the modes of participation are analyzed, tracing the shaping of the subject position of “the victims” and the role they are ascribed to within the proceedings.

In **Chapter 7**, the regulation of the direct encounter, through testimony and/or presenting views and concerns in person, of one of the participants with the Court are described. Thereby the subject position of the “relevant victim” is carved out determining the space from which the participants can be heard within the legal framework.

In the last **Chapter 8**, the organization of the encounter of those who work directly with the participants is reconstructed. They are delegated the responsibility of representing “the victims” and of selecting the “relevant victim” who may appear before the Court.

Beginning with the application forms, ending with the contact between the legal representatives and their clients, the different forms of representation and the irritating potential of an encounter with the participants are reconstructed. Based on the theoretical assumption that a legitimacy gap (*the justice gap*) is inherent in the legal strive for closure underlying the legitimizing narrative of bringing truth and justice to victims, the silencing effects within the organization of victim participation are revealed. At the same time, the resisting potential of the always already immanent (im)possibilities can be conceived of as constructive irritations, deferring closure. Thereby, the very concepts of presence and voice, propagated when claiming that „African victims“ voices are represented at The Hague are scrutinized.

With regard to the “Victims issue” and the “Africa issue”, I suggest to, on the one hand, take post-colonial critique of representational relations seriously. This implies a reading of legal practices that reflects the always already inherent *justice gap* and the entailed exclusionary violence of representation. The *justice gap*, and not the notion of truth and justice as a tangible product delivered to the „African victims“, is the starting point to engage in a less-hierarchical, more reflective relationship of the ICC with its constituencies.

There is no presence without absence and no voice without silence. With this dissertation I intend to contribute to a reflection of the absence in presence and the silence in voice in the practice of representation of the „African victims“ at the ICC.

Part I

Chapter 1: Foundations

1. Narrative of the need to involve victims from Nuremberg to the The Hague

“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.” (Cover 1983, p. 4)

The rise and importance of modern international criminal law is described as an “exciting development with no end in sight” (Shabas and Bernaz 2011, p. 1). The beginning of this development is traced back to the first international military tribunals installed after the Second World War. When the Allied Forces were confronted with the mass atrocities committed by the National Socialists before and during the war, both within Germany and in the occupied countries, the idea to hold individuals criminally responsible before an international body of law emerged.⁵ The tribunal at Nuremberg then, operating without precedent, should demonstrate that a legal response is a possibility besides politics and force and is therefore regarded as the foundation of institutionalized international criminal law. (Minow 1998) The subsequent evolution of international(ized) criminal tribunals and the parallel and interrelated story of the role victims played at and for these courts, is mostly described to be a more or less gradual process, a history of success from Nuremberg through Tokyo, Jerusalem, the Hague, Arusha, Free Town, Phnom Penh to the permanently operating ICC in the City of Peace and Justice. (Nouwen 2012) International criminal law grew relatively fast, both institutionally and substantially. The same pertains to the role of victims in international law in general and respectively also for international criminal law. From having barely any rights (domestically and internationally) and no distinctive role at the time of the Nuremberg trials, which was considered to be insufficient given the mass

⁵ It is exemplary for the visibility of mass atrocities committed during colonial rule, that I only mention them in a footnote to the story of the development of international criminal law, where they play hardly any, or no role at all. The crimes committed during WWII by the National Socialists are described to be unprecedented and unimaginable and it is said that they called for a reaction. The genocide committed by the Germans in Namibia, which was only recently acknowledged by the German authorities, and other colonial crimes did not cry for a reaction and still do not seem to cry loud enough. For a critical analysis of the search for historical origins: Tallgren (2014).

victimization and the character of the crimes, to a broad range of rights and a distinctive participatory role in the proceedings at the ICC. The narrative arc is one of “lessons learned”, improving the situation for victims with the practical experiences gained, using the whole “toolkit” of transitional justice, such as truth commissions to complement the courts.

“Today we accept without argument the idea that state actors responsible for atrocities should have to answer for their conduct in courts of criminal law – be they domestic, international, or of a hybrid character.” (Douglas 2012, p. 276)

The development is narrated as a triumph of law over politics and violence, piercing national sovereignty and assigning individual responsibility to those responsible of war crimes, crimes against humanity and genocide - the worst of all crimes (Nouwen 2012, p. 329). A similar story is told about the victims of these crimes and their role for and in international criminal justice. The implementation of the victim participation and reparation framework into the Rome Statute is repeatedly referred to as a milestone in international criminal justice (Donat-Cattin 2001, p. 182).⁶

While the ideas to hold individuals criminally responsible and to involve victims in the respective legal process are generally accepted, having a closer look it becomes clear that the concrete implementation is highly contested.

Without disparaging the achievements, it is worthwhile looking at this history of victims in international criminal law, as it is commonly narrated in the respective doctrine. A focus lies on the controversial discussions and tensions the implementation of victims’ participatory rights is said to have caused within the international criminal legal system, in order to trace this discrepancy between the generally accepted claim to bring truth and justice to “the victims” and its concretization. It is insightful to analyse the narratives telling the success story of international criminal law in general and victims’ role therein, in particular and in the subsequent chapter, to critically examine the legal theoretical discussions on the

⁶ Only recently, Presentation of the Court’s annual report to the UN General Assembly, Judge Silvia Fernández de Gurmendi President of the International Criminal Court, 5 November 2015, https://www.icc-cpi.int/iccdocs/presidency/151105_ICC_President_speech_to_UNGA-Eng.pdf, last accessed at 27/1/2016.

legitimatory basis of the ICC.⁷ When shifting the focus from the genuinely legal aspects of participation and reparation to the underlying narratives on victims and the criminal legal process, the images associated with “the victims” remained more or less stable while the need to rhetorically reiterate the importance of “the victims” for international criminal justice increased significantly. “The Victims” are depicted as the *emotional*, *political* and *unpredictable* and therefore potentially destabilizing within the *rational*, *unpolitical* and *predictible* legal process. Given these images, a tension is diagnosed, which is mostly discussed under the topic of purposes of international criminal law and subsumed under the headline of retributive vs. restorative justice. The suggested cures to ease the tension vary depending on the various normative understandings of law, it is framed within the question of how to involve victims in a meaningful and effective way and can be summarized under three main streams: collectivization and representation; externalization and a general reconsideration of the structure of criminal law.

The following analysis is structured more or less chronologically. Each subsection cursory introduces the legal framework and consequently traces the narrative framing of the implementation of said framework. The selection of topics and institutions analysed here are representative of the selection underlying the success story told within the narratives around victim participation at international criminal courts from Nuremberg to The Hague.⁸

1.1. Nuremberg – documents don’t lie

“Never before WWII had the world encountered an authoritarian power that combined a ruthless will to conquer the world with an explicit doctrinal of racial superiority [...]” (Nino 1996, p. 5).⁹ After the liberation of numerous concentration

⁷ For a general overview over the developments, among others: Garkawe (2012).

⁸ Three types of analyses can be distinguished, that were the basis for this chapter. Analyses dealing with the development of victims’ participatory rights explicitly, f.e. Aldana-Pindell (2004). Analyses, mostly monographs, dealing with victim participation at the ICC or ECCC more specifically and that begin with a historical recourse on the different forms of participation, f.e. McGonigle Leyh (2011), Moffett (2014), and analyses of the current participatory framework drawing on the history and development of the victims’ role within proceedings to criticize the current model exercised at the ICC. The last analyses in most cases only shortly observe that the reason for the establishment of the right to participate at the ICC was the failure of the ad-hoc tribunals. See: Friman (2009), Pena (2010), McAsey (2009).

⁹ Elegantly ignoring the racially doctinated colonial violence that was still ongoing by the time of the Nuremberg trials. Interestingly, Hannah Arendt mentioned the possibility that people in Congo could

and extermination camps, and the experiences of the massive destruction resulting from the war, the Four Major Allied Powers (Great Britain, France, the USSR and the US) negotiated how to react to such gruesome atrocities committed on a large scale. In August 1945 they established the International Military Tribunal (IMT) at Nuremberg, deciding to react legally and to charge the major war criminals and a range of representatives of influential professions in subsequent proceedings thereby intending to symbolically put the whole Nazi system on trial. The first trial against 21 of the highest representatives of the NS regime who were charged with conspiracy, crimes against peace, war crimes and crimes against humanity, was the first of its kind in world history. It is uncontroversial that these proceedings laid the foundations for the development of institutionalized international criminal law (Bassiouni 2013, p. 75). Since the IMT was an unprecedented enterprise in international law, theoretical and philosophical considerations and discussions concerning the legitimacy and purposes of international criminal law, still valid today, were prevalent at the time of its creation and in the legal analysis that followed. I will discuss the legal philosophical discussions taking place at that time and following Nuremberg below. There is a range of accepted legacies of Nuremberg, first and foremost the Nuremberg principles. For the purpose of this chapter it is important to note that individual criminal responsibility and liability of state actors for crimes against peace, war crimes and crimes against humanity was established, which contributed to the creation of a new concept of criminality and a shift insofar that the individual became a subject of international law (Mettraux 2011, p. 11). The latter is described as the paradigmatic shift pushing for a broader notion of responsibility and paving the way for the recognition of individual rights, which will become important for international human rights law and eventually for the evolution of victims' rights (Funk 2010, pp. 34–35).

Despite this accepted shift, victims and survivors were nowhere mentioned in the founding Statute of the IMT. Although rhetorically, the trials were among other reasons held to provide millions of victims of the Nazi regime with a *sense of justice* (Mettraux 2011, p. 5), in 1949 since the focus of the proceedings was on the crime

take the Eichmann trial as an example and initiate courts to try advocates of apartheid, which she found to be highly problematic, Arendt (2013, p. 386).

against peace the Allies regarded themselves as the victims of the war during which unimaginable atrocities were committed (Brants and Klep 2013, p. 39).

In the interpretation and narrative framing of the Nuremberg Trials and its relation to victims, it was mainly criticized for being too restrictive, in the selection and emphasis of the different charges, in the selection of witnesses and that this lead to a distorted picture of the crimes committed during WWII (Douglas 2001, p. 22). The systematic character of persecutions and executions of European Jews, Sinti and Roma and the persecution of political opponents was not known to the extent it is now, and it is criticized that the Nuremberg Prosecution with its exclusive focus on crimes committed during the war contributed to this ignorance. Crimes committed before the outbreak of the war, which are crucial to understand the anti-Semitic and racist politics leading up to the extermination- and concentration camps where thereby excluded from the evidence and record of the proceedings (Bloxham 2001, p. 64). This limitation was said to be reinforced by the marginalisation of victims', or survivors'¹⁰ voices, primarily due to the prosecutorial strategy based mainly on documentary evidence which was considered to be more reliable (Ibid., p. 17). Among the witnesses heard at Nuremberg, most were former SS members, camp guards and NSDAP members, survivor testimony, by contrast, was peripheral to the proceedings (McGonigle Leyh 2011, p. 136; Garkawe 2006, p. 86). In fact, only 14 victim-witnesses testified (Moffett 2014, p. 62). This strategy is not unusual given the common law approach of an adversarial system (Garkawe 2006, p. 93). The criminal process in domestic systems was conceptualized as a confrontation of the state and the alleged perpetrator with victims used as witnesses for the state's case against the accused. Victims are rendered invisible as victims and are only instrumentalized for the case as the less reliable because more *subjective form of evidence* (Doak 2003, p. 2). The assumption was that victims' interests equal that of the Prosecution (Ferstman 2011, p. 408). While this is an assumption that is characteristic for modern criminal law, the different domestic legal traditions continue to play a role when negotiating victims' rights at the various international tribunals. For the proceedings at the IMT it was actually submitted that prosecutors with civil law traditions were less reluctant

¹⁰ Interestingly, in the context of Holocaust trials, victims of the Holocaust are referred to as survivors, emphasising that victimhood and victimization is over. I will deepen the discussion about terms used with respect to victims/survivors etc. further below. For now I use survivor and victim interchangeably for victims of WWII and victim in the other cases.

to call witnesses to the stand than those from common law countries (Garkawe 2006, p. 91).

The rationale behind the strategy chosen by the main prosecutor for the U.S. Robert H. Jackson and the criticism it provoked is revealing about the image of “the victim” in criminal proceedings. It is said that “[B]y privileging historical document over personal testimony”, Jackson aimed at “establishing incredible events with credible evidence”(Douglas 2006, p. 97). The Prosecution was of the opinion that victims were *emotionally and psychologically too unstable* to testify given their horrific experiences. In consideration of the unpredictability of cross examination possibly challenging the reliability and the objectivity of victim testimony, they were perceived as *potentially counter-productive* to the Prosecution’s case (Garkawe 2006, p. 92). The decision to rely on documents was justified by Jackson, saying that:

“The prosecution early was confronted with two vital decisions... One was whether chiefly to rely upon living witnesses or upon documents for proof of the case. The decision was to use and rest on documentary evidence to prove every point possible. The argument against this was that documents are dull, the press would not report them, the trial would become wearisome and would not get across to the people. There was much truth in this position, I must admit. But it seemed to me that witnesses, many of them persecuted and hostile to the Nazis, would always be chargeable with bias, faulty recollection, and even perjury. The documents could not be accused of partiality, forgetfulness, or invention, and would make the sounder foundation, not only for the immediate guidance of the tribunal, but for the ultimate verdict of history. The result was that the tribunal declared, in its judgment, ‘The case, therefore, against the defendants rests in a large measure on documents of their own making’.” (Robert Jackson, Introduction, Harris 1995, xxxv-xxxi)

This approach and the need to translate original documents into the official languages of the court, in fact, lead to a situation where each document was read into the transcript to be translated, which caused commentators to call the proceedings a “citadel of boredom” with a “grip of extreme tedium” on everybody (West 2010, p. 1). The strategy chosen by the Prosecution was not uncontroversial even within the US Prosecution team. There were calls for more dramatic representations of the crimes and survivor testimony was considered to be one means to this end. It is submitted that more survivor witnesses testifying about the crimes subsumed under crimes against humanity would have better reflected the enormousness of the crimes (Bloxham 2001, p. 73; Douglas 2001, p. 78). Accordingly, Douglas understands the Eichmann trial in the 60s to be the respective revision of Nuremberg. By putting the

Holocaust into the centre of the trial and offering survivors the opportunity to testify the Eichmann trial was seen to be the more comprehensive treatment of the traumatic history. The challenge at Nuremberg to “assimilate evidence of unprecedented atrocity into a legal category of criminality” would have, according to Douglas, only be met by making use of the novel category of criminality, namely crimes against humanity (Ibid., pp. 158–160). Hence, the horrors of WWII were said to having been presented in an incomplete fashion at Nuremberg (Ibid., p. 100). Similarly, Bilsky argues that the current conception of crimes against humanity and the importance of victim-witness testimony was established at Jerusalem serving as a precedent for later tribunals (Bilsky 2014). The central role of survivors as witnesses was a deliberate decision by Attorney General Hauser in the Eichmann trial, for whom Nuremberg served as a negative example (Felman 2002, p. 133). The marginalisation and exclusion of victim-witnesses is perceived to be unjust for different reasons and again, the criticism is insightful for the underlying assumptions and pictures related to victims. As mentioned, survivors could have contributed to shift the focus to the genuinely unique crimes of WWII. They would have “injected real life experiences and stories to the proceedings, thereby making the trial much more dramatic and memorable.” (Garkawe 2006, p. 88) Denying the right to testify to all survivors was perceived to be unjust, because the victims were thus deprived of an opportunity to experience the cathartic effect of testifying (Ibid., p. 89). Hence, victims are associated with *courtroom drama*, which results in more media attention and consequently in more public interest, which is the basis for reaching educational purposes. At the same time, victim-testimony, for the very same reasons, is considered less objective and therefore not suitable for the legal staging of sobriety. But, victim-witness testimony can shed light to the character of the crimes and ensures that the extent and dimension of the crimes committed are represented in the proceedings. The criticism of the Nuremberg trial, iterating that victims were deprived of an opportunity to testify, already indicates the idea of an individual right of victims they can be deprived of, when they are excluded from the proceedings and forecasts the current situation where victims have individual rights in national and international proceedings. These criteria of evaluating victim participation in proceedings can be traced throughout the analysis of the respective international and national courts and become more nuanced over the time.

Albeit generally ambivalent, the IMT's legacy for international criminal law is impressive and it can justifiably be said that the Nuremberg principles laid the foundations for the establishment of the following tribunals. For that reason, the following courts had to stand comparison.

1.2. Tokyo

A tribunal that is often mentioned in one breath with the IMT, without being further analysed in the narrative of progress in international criminal law is the International Military Tribunal for the Far East (IMTFE). The IMTFE was established through a proclamation by U.S. General Mac Arthur in January 1946 and arguably it does not stand the comparison with the Nuremberg proceedings. (Boister 2011) The Tokyo trial is described as victor's justice of the worst kind and the lesson learnt is that it should never be repeated (Ibid., p. 17). The distinctions emphasised between the IMT and the IMTFE are informative about the fundamental assumptions of an adequate international criminal trial. It is said to having been motivated not by the atrocities committed by Japan, but primarily by the experiences of defeat of the U.S. The bench was composed of eleven members of different states (Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States of America) that followed their different national interests. The judges were said to be biased arguing that those from former colonial powers did not admit the historical parallels between Japanese and European imperialism. It is furthermore submitted that the selection of those criminals that were committed for trial was based on an incoherent exercise of discretion. This also applied to the selective prosecution of certain crimes with an emphasis on crimes against peace, thus neglecting the crimes against the civilian population in the occupied countries (Ibid., p. 28). This was most manifest with regard to gender-based violence in the form of sexual enslavement of mostly Korean and Chinese women. Since the Japanese successfully destroyed documentary evidence of their crimes, more witnesses testified at Tokyo than at Nuremberg, but among the victim-witnesses called were exclusively persons who could testify to the guilt of the accused. The selection was criticised for not reflecting the realities of the crimes committed, particularly disregarding numerous victims of the above mentioned sexual enslavement in the form of forced prostitution in the so called

comfort station (McGonigle Leyh 2011, p. 136). Implied in this criticism lies the image of a proper international criminal court the installation of which has to be motivated by the outrage and shock over the atrocities committed, national interests should not play a role, it should not be entangled in colonial relations. The expectation that the crimes charged at an international criminal court should be reflective of the crimes committed is not different from the criticism voiced at Nuremberg. The exclusion of gender-based violence at the WWII tribunals, is reflective of the lack of gender awareness in the formulation of the crimes and the priorities of prosecution and how the selection of crimes charged reinforces the silencing of certain groups of victims at that time and still nowadays.¹¹

Victims' testimonies are seen to be essential to make sure that the whole range and dimension of crimes is covered by the indictment and thus dealt with in the proceedings. They aim at completing the picture of crimes committed during wars and conflicts negotiated and drawn before the courts. At the same time this supports the assumption that victims are deprived of their right to be taken into account before national and international courts, if the selection of charges excludes the crimes they suffered from.¹²

The issues raised with regard to the Tokyo tribunal, the image of a perfect *impartial, unpolitical* tribunal on the one hand and the association of "the victims" with providing an insight into the scope and the dimension of the crimes to a certain extent resemble that at the IMT.

1.3. Eichmann and the collapsing witness

The trial of Adolf Eichmann in Jerusalem in 1960 is mostly discussed because it provided a stage for victim-witness testimony in an almost truth-commission-like

¹¹ To overcome the legal and societal silence Sakamoto (2001, p. 51), after 54 years, national and international women's rights and human rights organizations staged the Women's International Tribunal on Japanese Military Sexual Slavery in December 2000. The tribunal was a non-legal mechanism adopting the legal form applying procedural rules common to international courts. The legal form was used to acquire a powerful moral instrument assigning individual and state's responsibility for crimes largely neglected. Chinkin (2001) Thereby it was claimed that the systematic violation of basic human rights as a characteristic of Japanese colonialization was revealed. Chinkin (2001, p. 336) Many victims were given a chance to testify before the court compiling an allegedly comprehensive record of gender-based crimes committed during WWII in Asia. Nevertheless, they testified as witnesses and the procedural approach taken was adversarial, like at Nuremberg.

¹² This is one of the basic underlying assumptions of the Right to Truth and Justice which will be discussed in Chapter 2.

manner, allowing survivors to narrate their stories, instead of merely testifying to the guilt of the accused. Whereas the IMT and the IMTFE, are mostly seen as the starting point for international criminal law, the Eichmann trial, with its emphasis on survivors testimony is discussed for the formation of a collective memory and with regard to pedagogical purposes of criminal proceedings (Bilsky 2014, p. 29).¹³ Accordingly, it is submitted that the victims and their stories were the most memorable sequences of the proceedings in which a “jewish-israeli” narrative of the holocaust was shaped (Yablonka 2012, pp. 177–178; Bilsky 2014, p. 42).¹⁴ This was famously criticised by Hannah Arendt, who took a restrictive viewpoint on the purpose and scope of criminal proceedings (Arendt 2013, pp. 71–72). Considering the different theoretical approaches developed in the context of the proceedings, although it is a domestic trial, it is very insightful for the purpose of analysing victims’ role in and for criminal law. Firstly, it becomes clear that the space provided for victims’ stories in the proceedings is closely related to the discussion of purposes of criminal proceedings, secondly, the possibility and impossibility of bearing witness to *unimaginable* mass atrocities is broadly discussed, historically (Platt 2011; Langer 1991; Wieviorka 1999) and philosophically (Felman 2002; Agamben 2003) and lastly, albeit the “progressive” prosecution strategy with regard to victims, the discussions before, during and after the trial among jurists resemble that at Nuremberg. This is reflected in a quote by Attorney General Hausner:

“In any criminal proceedings the proof of guilt and the imposition of a penalty, though all-important, are not the exclusive objects. Every trial also ... tells a story ... Our perceptions and our senses are geared to limited experiences ... We stop perceiving living creatures behind the mounting totals of victims; they turn into incomprehensible statistics. It was beyond human powers to present the calamity in a way that would do justice to six million tragedies. The only way to concretize it was to call surviving witnesses, as many as the framework of the trial would allow, and to ask each of them to tell a tiny fragment of what he had seen and experienced ... Put together, the various narratives of different people would be concrete enough to be apprehended. In this way I hoped to superimpose on a phantom a dimension of reality.” (Hausner 1967, p. 292)

¹³ Arguing that the Eichmann trial developed international criminal law in terms of relying on crimes against humanity and submitting that the genocide convention is customary international law with a deterrent purpose, and in terms of liability for collectively committed atrocities; Emphasising the importance of the Eichmann trial for international law, Schabas (2013).

¹⁴ Bilsky (2014, p. 42), sees the role of victims in the proceedings as going beyond the construction of a collective memory as providing the necessary connection between the documentary evidence of a bureaucratically organised crime and the effects this had on the victims thereby demonstrating the protected social value behind the crimes of genocide and crimes against humanity.

The decision to primarily and extensively rely on victims' testimonies was not born out of procedural necessity. As for the Nuremberg trial, enough documentary evidence existed to prove the guilt of the accused Adolf Eichmann. It is submitted that General Attorney Gideon Hausner decided out of didactic reasons: "to capture the imagination and conscience of a domestic Israeli and world audience." (Douglas 2006, p. 97). Although this is what the Eichmann trial is famous for, during the preparations of the trial, the strategy was not uncontroversial. Discussions, similar to that at Nuremberg, took place as to why, how and for what purpose witnesses should be introduced. The prevailing opinion was that victim-witnesses are the less reliable form of evidence (Yablonka 2000, p. 382). The investigating unit of the Israeli police, Bureau 06, preparing the criminal file, had reservations about supplementing the documentary evidence with witness testimony, finding that the probative value of documents is higher and that witnesses are an *unpredictable source of knowledge*, potentially *counter-productive* to the case (Ibid., p. 379). Like in subsequent Holocaust trials, and at international tribunals, it was victims' organizations pushing for a broadening of the scope of the charges and consequently for a distinctive role in the proceedings. Concerning the purpose of testimony, Ya'kov Robinson an assistant of the prosecutor, exemplarily argued that,

"[g]hettoization is a hackneyed term and does not express the suffering actually entailed in it. Any testimony must be able to describe the "transports." Descriptions must be supplied of the suffering of people packed for days on end in horribly crowded conditions in closed cattle trucks. There must be descriptions of the hopelessness, the living conditions in the camps, the hunger and, in later stages, the desire for the end to come. To create the picture of the horrors of separating families and especially the way in which children were torn away from the arms of their mothers. To stress the fact that people were murdered right in front of their relatives or parents. In general, it should be borne in mind that the objective behind live testimony is to introduce tension into the trial and to raise the trial above the shadow of the mundane."¹⁵

While playing a major role in the public perception of the trial and for the victim-centred approach of the Prosecution, the testimonies were described by the judges as by-product of the trial not substantially impacting the judgement:

"Without a doubt, the testimony given at this trial by survivors of the Holocaust, who poured out their hearts as they stood in the witness box, will

¹⁵ Yablonka (2000, p. 382), citation of Ya'akov Robinson from a meeting at Yad Vashem Holocaust Museum, held on Nov. 23, 1960, on file with ISA, Bureau 06, File No. R.A./02, 3056/A (Hebrew) (regarding Holocaust survivor witnesses at the trial).

provide valuable material for research workers and historians, but as far as this Court is concerned, they are to be regarded as by-products of the trial.”¹⁶

Accordingly, the judges heavily relied on documentary evidence in their decisions, witness testimony was used to corroborate the *more reliable* form of evidence. Testimonies, it is admitted, do play an important role, but rather for purposes *beyond the law* (Yablonka 2012, p. 195). In light of the numerous witness testimonies, the judges felt the need to re-emphasise the limits of law:

“It is the purpose of every criminal trial to clarify whether the charges in the prosecution's indictment against the accused who is on trial are true, and if the accused is convicted, to mete out due punishment to him. Everything which requires clarification in order that these purposes may be achieved, must be determined at the trial, and everything which is foreign to these purposes must be entirely eliminated from the court procedure. Not only is any pretension to overstep these limits forbidden to the court - it would certainly end in complete failure.”¹⁷

It is this understanding of criminal law that was appreciated by Hannah Arendt, stating that it was the rational and objective style of the presiding judge Moshe Landau who is described to be bound to the voice of justice, saving the proceedings from turning into a mere show-trial (Arendt 2013, pp. 70–72). Emphasising the limits of law and implying that victim-witnesses when being allowed to narrate rather than testify *overburden legal proceedings*, is a common criticism in relation to victims (Landsmann 2012, pp. 116–117). It is submitted that “The courtroom was flooded with heart-rendering evidence that constantly assaulted the judge’s neutrality.” (Ibid., p. 71)

Furthermore, given the international competition for attention, “bloody evidence that makes headlines and fosters sympathy” was said to be needed to gain national and international attention to reach pedagogical purposes (Ibid., p. 84). It is remarkable that, despite the very different judgements on the value of witness-testimony in the Eichmann trial, the underlying narrative is quite similar. They serve pedagogical purposes, because they are dramatic representations of suffering. Either commentators consider that pedagogical purposes are legitimate, given the character of crimes, and or think that the representation of suffering by victims is essential to

¹⁶ District Court of Jerusalem, Criminal Case No. 40/61, Judgement introduction para. 2., 11 December 1961, English translation.

¹⁷ District Court of Jerusalem, Criminal Case No. 40/61, Judgement introduction para. 2., 11 December 1961, English translation.

reflect the crimes more comprehensively in their impact (Felman 2000, pp. 505–507). Or, commentators find that these purposes go beyond the scope of law, emphasising its boundaries (Arendt 2013, pp. 70–72; Landsmann 2012, pp. 70–72).

Another similar divide with regard to the Eichmann trial, is the contribution on the discussion of the possibility and impossibility to bear witness to what is described to be un-imaginable crimes (Brunner 2012; Langer 1991; Agamben 2003; referring to Levi 1995). This is related to a shift in the psychological narrative on trauma, being triggered by Holocaust testimonies and their analysis (Stern 2000). The related theories about trauma and language, trauma and testimony will be discussed in more detail below. Here, the exemplary interpretations and interferences triggered by a victim, a survivor of Auschwitz, collapsing in the witness stand are briefly outlined. They illustrate the challenges faced by traumatized victims having to testify before a court and the respective diverging interpretations concerning the relationship of trauma, victims and criminal courts.

The witness for the Prosecution Yehiel Dinoor was called on June 7th 1961. He was expected to be an important witness, since he saw Eichmann personally at Auschwitz and could therefore testify to the guilt of the accused. Yehiel Dinoor had published books about his experiences in Auschwitz, which he referred to as the chronicles from a planet called Auschwitz, under the name K-Tzetnik (standing for all those who died – those with no name) before the trial. When he, shortly after being introduced as a witness, talked about this planet and its inhabitants without names, he was interrupted by the prosecutor, demanding to ask some questions. Mr. Dinoor ignored this and continued speaking. Then Judge Landau intervened and asked the witness to listen to the prosecutor and himself. All of a sudden, Mr. Dinoor got up from his seat and collapsed, falling to the floor. Policemen carried him out of the courtroom, after the presiding judge called for a recess.¹⁸ The witness remained in coma for two weeks. This incident was largely covered by the press and allegedly became one of the most memorable moments of the trial. Although, Mr. Dinoor did not recover to testify again, and the testimony until his collapse was not relevant in the strictly legal sense, it found entrance into the judgement:

¹⁸ <https://www.youtube.com/watch?v=m3-tXyYhd5U>, Dinoor's testimony, the collapse and the reaction of the audience is depicted from min. 0.00 – 12.25.

“If these be the sufferings of the individual, then the sum total of the suffering of the millions - about a third of the Jewish people, tortured and slaughtered - is certainly beyond human understanding, and who are we to try to give it adequate expression? This is a task for the great writers and poets. Perhaps it is symbolic that even the author, who himself went through the hell named Auschwitz, could not stand the ordeal in the witness box and collapsed.”¹⁹

The case of K-tzetnik, collapsing in the witness box was commented and interpreted in fundamentally diverging ways. Once again, it depended on whether the commentators followed a more restrictive understanding of the criminal legal process, or a more extensive one. Hannah Arendt, representing the first approach, commented sarcastically, stating that “In response [to the invitation to listen to the prosecutor and the judge A/N] the disappointed witness, probably deeply wounded, fainted and answered no more questions.” (Arendt 2013, p. 336) She emphasised that this was an exception confirming the rule during the Eichmann trial, which was that most witnesses were not able to simply describe past events, let alone separate past events from what they heard and read about them in the meantime (Ibid.). She called this the procession of the witnesses, establishing their right not to talk on the matter in question (“Das Recht der Zeugen, nicht zur Sache zu sprechen” “The right of the witness to be irrelevant”) (Ibid., p. 337). In the same vein, it is alleged that:

“The clash between the desire to bear witness and the demands of the courtroom were here dramatized in the most powerful way. The cost of Hausner's importuning was substantial. One can hardly resist speculating about the impact of this scene of an emotionally and physically crushed Holocaust victim on the trial judges.” (Landsmann 2012, p. 94)

The victim-witnesses and their almost unbearable stories are described to have an uncontrollable and unpredictable effect on the judges and to be a burden on the psychological and emotional stability of the involved lawyers which might have an effect on their impartiality (Ibid., pp. 94–95). The stories are said to be irrelevant to the charges and the guilt of the accused and “likely to trigger the strongest emotional response” both from the lawyers and from the victims themselves who should be protected (Ibid., p. 94). The conclusion is that the policy of a witness-driven atrocity trial spread beyond Holocaust cases and profoundly influenced the ICTY. “In all these cases it has yielded long, slow trials with rafts of highly prejudicial victim-

¹⁹ District Court of Jerusalem, Criminal Case No. 40/61, Judgement, para. 119, 11 December 1961, English translation.

witness testimony that contributed to flawed proceedings and questionable results.” (Ibid., pp. 100–101; similarly Combs 2010)

The diverging and more favourable interpretation similarly assumes that the collapse of Yahiel Dinoor aka K-tzetnik symbolizes the clash between the language of the witnesses, their traumatic experience beyond understanding and the requirements of the legal process. But unlike the foregoing authors, they argue that the clash is not a burden but a moment in the legal proceedings where the dimensions of crimes against humanity are grasped (Felman 2002, p. 144; similarly Bilsky 2014). Or, “[T]he missed encounter allows for insights that an encounter, or a cohesive moment, might have foreclosed.” (Felman 2002, p. 144) In conclusion, these moments are essential for the so called “jurisprudence of atrocity” (Bilsky 2014, p. 57), dealing with vast scale victimization experiences. The distinction between purely legal purposes and historical, and/or didactic purposes is rejected, aiming at a broader understanding of legal proceedings in the context of mass atrocities.²⁰ These diverging views are emblematic for a deeper, theoretical discussion with respect to the possibilities and impossibilities of international criminal trials in general and their aims, effects and restraints vis á vis victims, in particular.²¹

1.4. After the Cold War: Re-emergence of institutionalized international criminal justice

In the aftermath of WWII and with the experiences of the two military tribunals and the following Holocaust trials all over Europe and in Israel, efforts to establish a permanent international court were made by the UN.²² As early as in 1948, the General Assembly requested the International Law Commission to study the subject-matter, the resulting report came to the conclusion that an international body of law is both desirable and feasible. Thereupon, the Committee on International Criminal Jurisdiction was set up, consisting of seventeen member-states of the UN who drafted two statutes, one in 1951 and one in 1953. In the course of the Cold War the

²⁰ Douglas (2012), Douglas (2001), Douglas et al. (2007).

²¹ A discussion that is elaborated in the following two parts.

²² Hannah Arendt and Carl Jaspers, when discussing the limits of law and the proceedings in Nuremberg and Jerusalem, saw a better solution in an international criminal court, dealing with crimes committed during WWII. Arguing that these crimes (crimes against humanity and genocide) are on the one hand beyond the law, on the other, they concern humanity and are not bound to national borders. Arendt et al. (1993, 452 et seqq.).

actual creation of such a court was on hold. To secure the transition, in the wake of the authoritarian regimes in Latin America and Southern Europe, amnesties were options chosen after the dictatorships. In that period there were hardly any international and national trials, other than Holocaust trials. Only after the Cold War, the efforts towards an international court were resumed. In 1989 the issue was re-introduced by a coalition of sixteen Caribbean and Latin American states. The recommendations of a new working group, installed after the initiative, were adopted by the General Assembly the same year they were submitted, 1992. Meanwhile, in the 70s and 80s debates on transitional justice matters in Latin America arouse. Following the authoritarian regimes, although demands for truth and justice were formulated and the possibility of punishing human rights violations debated, the need for a peaceful transition to democracy and to establish a corresponding nation-building narrative, with many higher ranking perpetrators still in power, amnesties were granted and truth and justice were approached very cautiously (Brants and Klep 2013, p. 42). “Recovery and stability it seems were achieved again by amnesties and victims were sidelined.” (Karstedt 2010, p. 22) Victims and their families, mostly of disappeared persons, played a crucial role in the establishment of truth commissions, calling for truth with regard to the whereabouts of their relatives and justice for what has happened to them. The expressive call for truth and justice emerged in the context of the state induced forced disappearances. This was interrelated with an international development, comprising the emerging discipline of victimology and its internationalization and the gradual establishment of a victim’s right to truth and justice and the state’s corresponding duty to prosecute in human rights law (Aldana-Pindell 2004, pp. 607–610). These developments will be discussed below, since they developed somewhat parallel to international criminal law and were later incorporated into the debates about victim participation at the ICC, the ECCC and the STL.

1.4.1. The ad hoc tribunals – bringing justice to victims?

Before the establishment of the planned permanent international court, the crimes committed during the war in Yugoslavia and shortly after in Rwanda lead the Security Council to discuss possible reactions. In 1993, it established an ad hoc criminal

tribunal, dealing with serious violations of international humanitarian law in the territory of former Yugoslavia since 1991.²³

“Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,”²⁴

After the first international military courts in the wake of WWII, the establishment of the ICTY was seen as the revival of institutionalized international criminal law and as a starting point for a new era of international criminal justice (McGonigle Leyh 2011, p. 138).

Interestingly, it is again emphasized that the motivation for the establishment of an international criminal court lies in the shocking character of the crimes committed striking human consciousness. Furthermore, as apparent from the quote, victims, once again, like at the tribunals after WWII, are not mentioned in the official legal foundations of the court. Given the fact that the tribunals were established based on a Chapter VII resolution, the expressive purpose is that by providing redress for serious violations of humanitarian law, the latter are stopped, and peace can be restored and maintained. Due to this distinct legal basis and due to the fact that crimes existed prior to the conflicts and were subsumed under customary international law, the discussions regarding legitimacy differed from that at Nuremberg (Morris and Scharf 1995, p. 37 et seqq.). It was discussed whether an ad hoc tribunal was within the competences of the Security Council under Chapter VII, not, if criminal justice itself was a legitimate mean (a.o. Alfred P. Rubin 1994; Alvarez 1996; Lombardi 2003). Despite this discussion, in November 1994, the International Tribunal for Rwanda was established through a similar resolution of the Security Council.²⁵ The procedural rules adopted by the ad-hoc tribunals are based on a draft prepared by the U.S. and are hence shaped according to the adversarial model. A

²³ S/RES/808, 22 February 1993 and S/RES/827, 25 May 1993.

²⁴ Ibid.

²⁵ S/RES/955, 8 November 1994.

proposal to introduce victim participation through a separate victims counsel was rejected for fear that such an institution might conflict with the Prosecution's case. It was submitted that third party participation "would divert attention from the relevant issue of the criminal proceedings." (Morris and Scharf 1995, p. 167) According to the model adopted, the Prosecution, by representing the interests of the international community, was representing those of the victims. The only distinct interests of the latter were considered to be compensations, which was outside the courts mandate anyways (McGonigle Leyh 2011, pp. 145–147).

Due to the common law approach with regard to victims, granting only the opportunity to testify, to submit *amicus curiae* observations and having the Prosecution submit impact statements, victims are hardly ever able to tell their stories in a narrative form. The stories have to fit into the narrow legal framework and the predetermined story of the case defined by either one of the parties. (Tochilovsky 1999) Following the U.S. American model, victim statements submitted by the Prosecution were the only possibility, beside testifying if being called, for victims to *tell their story*. These statements were considered in the context of sentencing deliberations.²⁶

But unlike Nuremberg, the ad-hoc tribunals, lacking the documentary evidence, had to rely heavily on eye-witness testimony (Combs 2010, p. 6; Rydberg 1999, p. 455) Or, in the words of a former ICTY judge: "Victim-witnesses are the soul of war crimes trials at the ICTY." (Wald 2001, p. 107)

Given the developments in victimology, international human rights law and transitional justice, the drafters of the statutes were more sensitive to victim's security situations and in contrast with Nuremberg, the ICTY and ICTR Statutes introduced a number of progressive measures to assist and protect victims (Garkawe 2012, p. 283). Accordingly, a Victim and Witnesses Unit was established at the Registry of the courts and the courts were provided with the legislative power to develop measures to protect victims with special consideration for *vulnerable* ones (Rydberg 1999, p. 458 et seqq.) Ideas to locate this Unit with the Office of the Prosecutor were dismissed by the judges, which is interpreted as exemplary for a shift in awareness

²⁶ Prosecutor vs. Tolimir, Case No. IT-05-88/2-T, Judgement Trial Chamber II, 12 December 2012, para. 1218, considering the long term effects on victims, the so called Srebrenica syndrome.

away from victims as evidence for an effective prosecution to a more human concern supporting victims as witnesses (Morris and Scharf 1995, p. 166). This awareness is again reflective of broader international developments. Concerning the value and purpose of victim-witness testimony, similarly to the statements of prosecutors at the previous courts, Carla del Ponte holds that:

“The courtroom testimonies of eyewitnesses are fundamentally important – they tell us about the horrifying conditions of the detention camps, ethnic cleansing campaigns, torture, rape and sexual slavery, mass executions, destruction of property and religious institutions, plunder and looting. Most importantly they tell us about human suffering. They must be told and listened to. [...] Their personalized stories make us feel how it was to be there – in that particular place at that particular time.[...] Those willing to listen will understand that the testimonies of the very modest, not sophisticated people, very ordinary people can bring to understanding the core issues.”²⁷

The instrumental approach towards victims, and the pressure of cross examination, caused disappointment among victims testifying and, was criticised for being too restrictive and possibly re-traumatizing by commentators (Haslam 2004; Stover 2005; Mischkowski 2002). Empirical analysis revealed a gap between the rhetorical promises, such as “[B]ringing war criminals to justice Bringing justice to victims”²⁸ and the realities for victims and their communities (McGonigle Leyh 2011, p. 147). Furthermore, criticism pertaining to the purpose of the ad-hoc tribunal, bringing peace, especially within former Yugoslavia came up:

“However, the apathy and indifference towards the war crimes trials among victims betray a sense of hopelessness and utter lack of expectations that such trials will change much when it comes to their current status and relations in their communities. Victims’ expectations now appear to be solidly focused on individual perpetrators being removed from their midst. The dominant perception among Prijedor victims is, however, that a comprehensive, transformative, sort of justice is beyond reach and that war crimes trials cannot deliver on such promises in the present political and communal climate.” (Hodzic 2010, p. 133)

The only provisions that solely aimed at victims’ alleged interests, the compensation regulations were criticised for being ineffective, because there is no mechanism to properly enforce said rights before domestic courts (Ferstman 2002, p. 671). In 2000 then Chief Prosecutor Carla del Ponte, aware of the criticism and the

²⁷ McGonigle Leyh (2011), citing an excerpt of an Address by Chief Prosecutor Carla Del Ponte at the conference on „Establishing the truth about war crimes and conflicts”, Zagreb, Croatia, 8-9 February 2007.

²⁸ <http://icty.org/>, slogan on the official web page of the tribunal.

described gap, suggested to incorporate victim compensation and a form of participation into the RPEs.²⁹ The Judges, while generally being in favour of the idea, rejected it for reasons of new allocation of resources, the fear that the length of the proceedings would be affected and that it would possibly infringe upon the rights of the accused.³⁰

The main possibility to include victims' voices, the victim statements were first and foremost valued because they "provide a picture of the defencelessness of the victims and the gravity of the crimes" (McGonigle Leyh 2011, p. 144). They were interpreted as an indication for the "degree of suffering." (Ibid., p. 147) The Chamber in Krstić submits that by means of the impact statements, a "voice to the suffering of the victims" is given.³¹ And these voices "[...] paint a picture of shattered lives and livelihoods, and of tremendous ongoing pain and trauma. The Trial Chamber is therefore mindful of the suffering of these victims [...]"³²

As previously mentioned, this treatment of victims as witnesses and representatives of suffering was broadly criticised for being insufficient with regard to the broader goals of the ICTY and ICTR, namely restoring and maintaining peace (in this vein Paterson 2003). Since criminal courts are, according to this understanding of their mandate, considerate of their impact on society as a whole, it was claimed that victims as central members of society play a crucial role as stakeholders in transition.³³ Accordingly, the reduction of victims to evidence, rather than subjects with interests of their own, caused the tribunals to be perceived as disconnected from the affected societies (Donat-Cattin 2008, 3; Pena and Carayon 2013, p. 521; Kamatali 2005; SáCouto and Cleary 2008, p. 80 et seqq.). Contrary to the criticism voiced concerning the lack of witness testimony at Nuremberg, here, it is alleged that the victims were deprived of an opportunity and that being instrumentalized as a witness is a de-humanizing and potentially re-traumatizing experience (Franke 2006, p. 818; Dembour and Haslam 2004, p. 167 et seqq.)

²⁹ S/2000/1063, Appendix. Already referring to the respective provisions in the Rome Statute.

³⁰ S/2000/1063, Appendix. Already referring to the respective provisions in the Rome Statute.

³¹ Prosecutor vs. Krstić, Case No. IT-98-33, Judgement Trial Chamber I, 2 August 2001, para. 703.

³² Prosecutor vs. Bralo, Case No. IT-95-17, Sentencing Judgement Trial Chamber III, 7 December 2005, para. 40.

³³ ICC-ASP, Court's Revised strategy in relation to victims (5 November 2012), http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf. Accessed 30 October 2014.

In the words of Judge Claude Jorda, the ICTY and the ICTR failed to “take into account the fact that, by participating in the proceedings . . . a victim may be able to regain his dignity, thereby contributing, ultimately, to the restoration of peace and security in Rwanda and the former Yugoslavia.” (Jorda and Hemptinne 2002, p. 1389)

This marks a shift in the understanding of the role of victims for the courts and the role of the courts for victims. Firstly, the latter question: What does being a victim witness mean, was already discussed broadly in the context of the Eichmann trial, but now, *telling one's story* and being participated beyond testifying is a consideration to meet the victims' right to be acknowledged within the legal process as a subject rather than an object, as individuals with dignity who have the right to be recognized as persons before the law (Wemmers 2012, p. 80). This is put into the larger purpose of restoring peace and security (Baumgartner 2008, pp. 435–437; Hobbs 2014, pp. 28–29). The indicated shift to the recognition of individual rights of victims has arguably also lead to the shift in evaluating international criminal courts. Now it is not about avoiding boring proceedings by introducing victim-witness testimony which is considered more *dramatic* and or representing the whole dimension of the crimes but it is furthermore about doing justice to victims' needs related to the legal process. While this aims at the recognition of victims as subjects, they remain means to pursue the broader goal of re-storing trust into the justice system and rebuilding the rule of law in order to restore and maintain peace.³⁴ In a further step, the rhetorical shift of affirming that one of the the ad-hoc tribunals purposes is *bringing justice to victims*, it is considered to be to a certain extend irreconcilable with the retributive institutional design of the courts (Clark 2009). Once again, victims' possible involvement is discussed within the framework of purposes of international criminal courts and consequently related to the limits of criminal law - wherever they are drawn. If international criminal law is strictly confined to so called retributive purposes, victims have to be excluded as victims. Criminal proceedings are not about hearing the “tens of thousands of victims of crimes”, but focussing on the individual criminal responsibility of the perpetrators, thereby its efficiency is maintained but at the same time a certain perception of void

³⁴ I will further elaborate this shift when discussing the two legitimizing narratives with regard to victims, truth and justice and healing through participation.

is created (Chifflet 2003, p. 110). Apart from the shift in recognizing victims as subjects with certain human rights to be involved in legal proceedings, this negotiation of the limits of law vis à vis “the victims” and their stories and the related perception of a gap, if they are absent, like in Nuremberg, and of overburdening the proceedings like at Jerusalem, are recurring patterns.

Against the backdrop of the so called transitional justice toolkit which did not exist at the time of the first military tribunals, the perceived gap between the the claim of bringing justice to victims and their limited role left at the ad hoc tribunals, is suggested to be filled among others with the establishment of the so called alternative mechanisms, the most prominent of which are truth commissions (Ibid.). Thereupon, different approaches were taken, to address the alleged interests of victims, to live up to the developments in international human rights law and to close the gap (Mendez 2009, p. 60).

1.4.2. International(ized) Courts and truth commissions

„Unless, in a matter of months, the steps taken by the Government of Indonesia to investigate TNI involvement in the past year’s atrocities bear fruit, both in the way of credible clarification of the facts and the bringing of justice to perpetrators (...) the Security Council should consider the establishment of an international tribunal for the purpose.”³⁵

The government of Indonesia opposed an international tribunal and so a new species of international courts emerged – the so-called hybrid – or internationalized courts, the characteristics of which are either/or/and that they are made up of mixed domestic and international personnel, are located in the country where the crimes took place and have a hybrid (domestic/international) legal basis. Accordingly, the approaches differ, depending on the model chosen.

Following the atrocities committed in the wake of the vote for independence of East Timor in 1999 which was reported by an international investigation team, the UN installed a transitional administration responsible, among others, for the administration of justice (McGonigle Leyh 2011, p. 151). Instead of the proposed international tribunal, the United Nations Transitional Administration in East Timor (UNTAET) established the Special Panels for Serious Crimes (SPSC) at the District

³⁵ UN Doc A/54/660, para 74.6.

Court of Dili. This was the first internationalized court ever established³⁶. With regard to victim involvement, the SPSC employed a progressive model, incorporating international developments in human rights law and procedural provisions similar to that of the Rome Statute (Ibid., p. 152). In accordance with this approach, although not granted an absolute right to participate, victims had a right to request being heard at any stage of the proceedings other than the review hearing. Furthermore, similar to the ad hoc tribunals, the victims' safety, physical and psychological well-being, dignity and privacy are protected, and they were able to request a review of the prosecutors' decision not to pursue investigations.³⁷

Observers contend that hybrid courts were an "experiment" taking into consideration the above outlined criticism of the ad hoc tribunals (McAuliffe 2011, p. 23; citing a.o. Linton 2001). The aim was to bridge the gap between the courts and the affected society, not only geographically, and to render the justice process closer to "the victims" (Dickinson 2003, pp. 301–303). In fact, often the courts were rather a political compromise due to the political realities in the respective countries.³⁸

Despite this broad set of rights, victims hardly played any role since participatory possibilities were practically not used. This might also be the reason why the SPSC is almost never discussed in the context of victim participation, au contraire to the Extraordinary Chambers at the Court of Cambodia (ECCC) and, in a different context, the Special Court for Sierra Leone (henceforth SCSL). For different institutional and political reasons Stanley concludes that "Timorese individuals have been marginalized in different ways – for example, in the omission of certain, less powerful groups from recognition as victims [...] and in the exclusion of local population from participation in the legal practice." (Stanley 2009, p. 108)

Besides the SPSC and the SCSL, another form of internationalized court structure was established under the UMIK mandate in Kosovo. In this case, a number of

³⁶ Although at that time, negotiations as to how atrocities could be prosecuted were ongoing in Cambodia and it is said, that the design of the SPSC is based on the Cambodian model. Linton (2001), p. 203.

³⁷ UNTAET Regulation 2000/30, 25 September 2000, amended by UNTAET Regulation 2001/25, 14 September 2001, Sections 12, 14.3, 36. 8.

³⁸ This was the case for East Timor and Cambodia where NGOs were in favour of an independent international tribunal on the model of the ad hoc tribunals, fearing for too much political interference of the governments.

international judges and prosecutors were introduced to the already existing judiciary for reasons of fear for the impartiality against the backdrop of the continuous division of the Kosovan society which was accentuated by the war (Hartman 2003, p. 7 et seqq.). Since the Kosovan Criminal Law provides for a broad standing of victims in the proceedings, typical in civil law countries, this also applies for victims of the war. They can participate as subsidiary prosecutors or as an injured party (McGonigle Leyh 2011, p. 157). Therefore, victims in Kosovo, if they assumed their rights, would be parties to the proceedings, represented, or unrepresented (Ibid.). Against this background, it would be instructive to have more empirical information about how this broad standing is perceived by all participants to the process, unfortunately, little is known about this (Ibid.). It seems as if victim protection plays a crucial importance in Kosovo when it comes to assuming one's rights to participate. In the context of the *success story* of victims in international criminal law, these internationalized courts are hardly ever discussed.

1.4.3. Truth Commissions as a victim-friendly alternative?

In the cases of East Timor and Sierra Leone, another relatively new mechanism was established – the truth commission. It was hoped that the two transitional justice tools would create synergy effects, not least because it was felt to be necessary to provide victims with an opportunity to narrate their stories. The experiences made, with regard to victims, varied from country to country, despite this variation dependent on the political and societal context, yet again empirical studies observed that the mechanisms did not live up to the expectations and the narratives produced were criticised to be exclusive.

Parallel to the criminal legal mechanism in Timor Leste, a truth commission (Commission of Truth and Friendship CTF) was established in July 2001. Thereby it was alleged that „Victims of human rights violations were given the opportunity to share their experiences, in their own words and language, in an open public forum. (...). It assisted in restoring some to the dignity they had lost by encouraging acknowledgement of their struggle and contribution.”³⁹ But while this reference to victims was generally made, commentators criticised that “no specific role or responsibility was designated to them in the Regulation (on the Community

³⁹ CAVR report 2006, Section1, para 94.

Reconciliation Progress A/N)” (Kent 2004, p. 44). With regard to the objective of reconciliation in the CRP (a related reconciliation mechanism) the criticism concerning victims’ limited voice therein, resembles that of the TRC in South Africa (Ibid.; Moon 2008). Although ideally the work of the truth commission should have complemented the work of the SPSC, the overall conclusion for both transitional justice mechanisms is rather negative not only with regard to victims involvement therein, which was mainly said to be due to political and economic restraints (Stanley 2009, pp. 102–108; Kent 2004; Linton 2001). This means that there again was a gap between the noble motives somewhat predefined by international developments in victim’s rights and the concrete implementation. A combination of hybrid court and truth commission that gained more attention than the case of East Timor, is the the SCSL. It was established after the ad-hoc tribunals as a treaty based sui generis court of mixed jurisdiction and composition based in Freetown and operating in most part from there. Since its legal framework mirrors that of the ICTR, the situation for victims at the court resembles that of the ad-hoc tribunals. At the same time a truth commission was instituted where victims could testify in a narrative form and without being selected by the Prosecution (Mibenge 2013, p. 128). This co-existence is described to be one of the most notable aspects in the Sierra Leonean transitional justice context (Mendez 2009, pp. 66–67; Schabas 2004, p. 180). In accordance with the suggestions of ICTY President Jorda, to establish a truth commission parallel to the court to meet victims expectations and needs, the situation in Sierra Leone is portrayed to be a positive example of the cooperation of two distinct transitional justice mechanisms to provide victims with the possibility to *tell their story* and to be a more comprehensive form of justice, closer to the communities affected (Mendez 2009, p. 63; Smith 2004). Victims are considered to be the primary beneficiaries of the synergy effects of the SCSL and the Truth and Reconciliation Commission (TRC) (Ibid., p. 127). William A Shabas draws the picture of the relationship, as the TRC being the plumber and the SCSL the electrician, both work in different parts of an unfinished house. “Nobody would want to live in a finished house that lacked either electricity or plumbing. In this sense, the ‘relationship’ is synergistic, but it probably involves little or no formal cooperation, as the practice of the two bodies in Sierra Leone appears to be demonstrating.” (Schabas 2004, p. 180) A closer look at both mechanisms shows, that albeit the limitations of the criminal legal framework vis à

vis victims is often described to lie within the retributive framework as opposed to the restorative approaches of TRCs, there are general limitations integral to both mechanisms when it comes to the truth-telling function (Buckley-Zistel 2015; Krog 2011; Kelsall 2005). This is closely related to the image of the victim and the alleged interests of victims and how they relate to the actual participating victims. In April 2003 the TRC began to hold public hearings in Freetown and twelve provincial districts. Throughout the proceedings, 9000 statements were taken, more than 450 people testified in thousands of hours of testimony (Ibid., pp. 363–364). The objective was, similarly to East Timor and other truth commissions, to create and provide

“an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.”⁴⁰

With regard to victims the work of the TRC should “help restore the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered [...]”⁴¹ Contrary to what is expected of “the victims” and of the healing effect of *truth-telling*, empirical studies alleged that victims testifying before the TRC seemed to be disconnected from the process, seeing it as a trade-off of the story for a share of the government’s economic resources in form of reparations (Ibid., p. 371). In line with this, it was noted that the stories told were more an “offering a version of the truth composed of cold facts and little more” in order not to be emotionally overwhelmed (Ibid.). Now the expectation, that the victims need was to narrate their story in an emotional and truthful way, was disappointed by the presentation of cold facts, which in turn is exactly what victims are expected to offer when testifying before a court. Of course, it is the cold facts chosen by the victims and not by the requirements of the case or under the pressure of cross-examination. Notwithstanding that the style of interrogation by the commissioners was partly described as “indeed very much like

⁴⁰ TRC Act 2000, Article 6(1); found at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf>.

⁴¹ TRC Act 2000, Article 6(2)b.

that of an opposing attorney in court.” (Ibid., p. 374) Furthermore, it is criticised that:

“This imposition of a transitional justice response and model is revealed in the evident disconnection between the TRC Report and the lived reality of Sierra Leonean men and women. It manifests itself in an elitist tendency to devalue indigenous processes in order to legitimize elite institutions such as commissions and courts.” (Mibenge 2013, p. 154)⁴²

Moreover,

“[T]he overriding effect of the TRC Report’s presentation of gender and gender-based violence in armed conflict, and the periods preceding and following it, was that the voices of women were not as loud as the legal analysis and legal definitions of the war experience.” (Ibid.)

Truth Commissions, like courts, have a limited mandate, depending on the respective founding documents. The acceptable truth told has to fit into this postulated narrative and depends very much on the implementation and practice shaping the hearings and therefore the truth constructed. Just like before courts, there is no simple truth to be uncovered, but truth is the outcome of a process of narration. In the case of truth commissions, the past is constructed through the process of narrating before the commission, victims in this context, albeit they have more space and time to narrate, adapt to the requirements and the narrative form of the respective truth commission. The truth told has to fit into the causal emplotment and is directed by the commissioners conducting the hearings (Buckley-Zistel 2015). This does not only hold true for East Timor and Sierra Leone, but was famously criticised in the case of South Africa, which is considered to be the prototype of TRC, although it was not the first one.⁴³ Within this mandate, victims can narrate more or less freely without the evidentiary restrictions of a court, but still the expected cathartic effect, for both the victim and the society is highly contested (Shaw 2005, p. 7). Also, the criticism shows that the pitfalls of establishing a truth-telling – truth-searching mechanism, namely being exclusive and elitist, remain,

⁴² Similarly: Shaw (2005), holding that: “Sierra Leone’s TRC, like South Africa’s, valorized a particular kind of memory practice: “truth telling,” the public recounting of memories of violence. This valorization, however, is based on problematic assumptions about the purportedly universal benefits of verbally remembering violence.”, p. 1.

⁴³ Hayner (2011), p. 74, citing Mahmood Mamdani who claimed that the commission produced a compromised truth that has written the vast majority of victims out of history.

regardless if it is legal, or so called alternative.⁴⁴ The truth uncovered will always “be shaped by the investigative methodologies” (Bisset 2012, p. 35). “What is also increasingly clear is that the idea of a single, objective truth is a false construct.” (Ibid.) The South African truth commission therefore differentiated between four notions of truth: factual or forensic truth; personal or narrative truth; social or ‘dialogue’ truth (see below) and healing and restorative truth.⁴⁵ Whereas personal and narrative truth is associated with the individual, subjective truths of victims (and perpetrators), the factual, or forensic truth is described to be “[T]he familiar legal or scientific notion of bringing to light factual, corroborated evidence, of obtaining accurate information through reliable (impartial, objective) procedures, featured prominently in the Commission’s findings process.”⁴⁶ In contrast “[T]he stories told to the Commission were not presented as arguments or claims in a court of law. Rather, they provided unique insights into the pain of South Africa’s past, often touching the hearts of all that heard them.”⁴⁷ By providing victims with the possibility to narrate their truths, the TRC claims to recognize the healing potential of telling one’s story and at the same time “[I]n so doing, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless.”⁴⁸ Similar to the descriptions at the courts, victims are associated with the subjective, emotional and non-legal – non-factual truth, while forensic and factual truth is associated with the legal (scientific!) requirements of truth. The perception of the victim and her or his role does not differ significantly from the foregoing descriptions in the discussions at national and international courts. Above that, in all cases, a gap between the noble motives of victims’ involvement in truth-finding mechanisms and the practical implementation is observed and criticised.

⁴⁴ Kastner (2008, p. 157), holding that there was never a truth commission that was considered to be successful, which she does not consider to be the essential function. She rather sees the latter in the generation of the *Bedingung der Möglichkeit* to address the past.

⁴⁵ TRC report Volume I Chapter 5 para. 29,

<http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf> last accessed, 20 October 2015.

⁴⁶ Ibid., para 30.

⁴⁷ Ibid., para 36.

⁴⁸ Ibid., para 37.

1.5. The Extraordinary Chambers in The Courts of Cambodia

As in the East Timorese case, the investigating group of experts who reported on the crimes committed by the Khmer Rouge in Cambodia, initially recommended to establish a purely international court under the UN mandate. Given the Cambodian refusal to agree to such a tribunal, in January 2001, after four years of protracted negotiations, Cambodia's National Assembly approved the Law on the Establishment of Extraordinary Chambers in The Courts of Cambodia (ECCC).

Notably, neither the agreement between Cambodia and the United Nations, nor the law on the establishment of the extraordinary Chambers provide for a right for victims to participate (SáCouto 2011, p. 303). However, proceedings are to be conducted in accordance with Cambodian criminal procedures. Under the Cambodian Code of Criminal Procedure, victims are allowed to bring, as civil parties, an action to seek compensation for injuries endured. The purpose of the Internal Rules of the ECCC as a hybrid court then was to 'consolidate applicable Cambodian procedure for proceedings before it'. Given this structure, the ECCC draws upon Cambodian civil law tradition allowing victims to participate as a *partie civile* in the proceedings which is unique in international criminal law. The central norm with regard to the purpose of civil party participation at the ECCC is, Internal Rule 23:

1. The purpose of Civil Party action before the ECCC is to:
 - a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and
 - b) Seek collective and moral reparations, as provided in Rule 23 quinquies

The purposes of victim participation at the ECCC are described independently from this rule, according to the same international principles other international courts refer to when interpreting norms on participation.⁴⁹ Along these lines, the Pre-Trial Chamber noted that "the inclusion of Civil Parties in proceedings is in recognition of the stated pursuit of national reconciliation."⁵⁰ It is emphasised that in order to pursue reparation claims, Civil Parties have the right to participate in

⁴⁹ See Pre-Trial Chamber, Case against Nuon Chea, Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, No. 002/19-09-1007-ECCC/OCIJ/PTC01, C11/53, paras 30-31 referring to the Declaration and the Guidelines.

⁵⁰ Ibid., para 37, referring to the General Assembly Resolution 57/228, 18 December 2002nd the Preamble of the Internal Rules.

proceedings against those responsible for crimes within the jurisdiction of the ECCC.⁵¹ As opposed to the ICC, Civil Parties do not need “to show any special interest in any stage of the proceedings.”⁵² This reflects the civil legal tradition where victims participate as parties and participation is among other objectives aimed at receiving a title for reparation claims.

Furthermore, contrary to most other courts and due to the civil legal tradition with the institution of an Investigating Judge, civil parties have far reaching rights in the investigation phase of the proceedings. Like the other parties, they can request the Investigating Judge to conduct investigations on their behalf, a respective denial has to be explained. Furthermore, decisions taken during this phase can be appealed before the Pre-Trial Chamber. Since the scope of the case is determined at this early stage of the proceedings, the right provided for victims leave them with a distinct role in influencing the crimes charged and thus shape the trial. As aforementioned, the lack of respective influence became important with regard to the inclusion or exclusion of gender-based violence. In the case of the ECCC it was the initiative of civil parties that lead to the inclusion of forced marriage into the charges of case 02.

Another difference to the ICC is the formulation ‘by supporting the Prosecution’, while Chambers at the ICC referring to jurisprudence of the ECtHR underline that the interests of victims are independent and distinct from those of the Prosecution.⁵³ Here, the express role of victims is to support the latter, repeatedly, the Defence raised concerns regarding the right to a fair trial and the equality of arms principle, complaining that Civil Parties became second prosecutors (Kirchenbauer et al. 2013, pp. 4–5). As opposed to this, in some instances, civil party lawyers made submissions presenting opposing positions to the Prosecution which were then criticised for the lack of coordination at the cost of the expediency of the trial (Ibid.). This controversy reveals a systematic tension within the ECCC participation scheme. On the one

⁵¹ Trial Chamber, Case against Kaing Guek Eav alias “Duch”, Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses testifying in Character, 9 October 2009, No.001/18-07-2007/ECCC/TC, E72/3, para. 11.

⁵² Pre-Trial Chamber, Case against Nuon Chea, Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, No. 002/19-09-1007-ECCC/OCIJ/PTC01, C11/53, para 49.

⁵³ La Chambre Préliminaire I, Situation en République Démocratique du Congo, Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, 17 janvier 2006, ICC-01/04-101, para 51.

hand, Civil Parties in domestic jurisdictions are parties to the proceedings and thus independent actors with a broad set of procedural rights. 'Their interests and strategies are not, and do not have to be, identical to the Prosecutions'. On the other hand, Civil Parties at the ECCC are supposed to support the Prosecution, without becoming second prosecutors, which draws a thin line between undue interference with the rights of the accused and legitimate assistance. This tension and the perceived difficulties of implementation is dealt with in a central decision on victim participation and a strong dissent thereto, exemplifying a shift in addressing victims' rights, namely a restrictive approach, and the re-consideration of the purpose and limits of international criminal law vis à vis victims. In line with the decision, amendments to the Internal Rules decisively restricted the participatory scheme at the ECCC. The restriction of victims' rights through the amendment of the victim participation scheme is reflective of a general re-consideration of victims, courts, their relation and purpose, while the narrative patterns constructive of the victim remain the same.

In its decision on the participation of Civil Parties in sentencing, the majority of the Chamber in Case 001 reiterates that the civil party model, developed in the ECCC Internal Rules and based upon Cambodian criminal procedure, must be consistent with the specific nature of criminal proceedings of persons who were senior leaders and most responsible for crimes committed against millions of people in Cambodia. Consequently, it held that features of more traditional civil party models are devised for less complex proceedings and thus require adaptations.⁵⁴ Interpreting the ECCC Law and the nature of the respective proceedings as limitations which must be acknowledged, the majority concluded that a restrictive interpretation of the rights of the Civil Parties is required.⁵⁵ Notwithstanding that the number of victims and in general the complexity of the proceedings is a difficulty faced by all courts in international criminal law, this conclusion is unique. Contrary to the ICC, where victim's rights are positively defined against the backdrop of the supplementary requirement of the personal interest which has to be affected, the

⁵⁴ Trial Chamber , Case against. Kaing Guek Eav alias "Duch", Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses testifying in Character, 9 October 2009, No.001/18-07-2007/ECCC/TC, E72/3, para. 12.

⁵⁵ Ibid., para 13.

interpretation of the majority in this case leads to a restrictive definition of rights that are already provided for under the civil party regime.

Concerning the role of Civil Parties and the reason behind the inclusion of victims in the proceedings at the ECCC, the majority holds that “[T]he clear policy reason for this right of participation is that it is in the interest of both of the Cambodian community, as represented by the Co-prosecutors, and of the Civil Parties themselves to obtain a decision on the criminality of the actions of the Accused.”⁵⁶ Having determined the different motivations of the parties to the proceedings, the issue of equality of arms is addressed and solved by saying that “while the Civil Parties have the right to support or assist the Prosecution, their role within the trial must not, in effect transform them into additional prosecutors.”⁵⁷ Consequently, each party should remain within the clearly defined roles, “in keeping with their particular interests and responsibilities at trial”.⁵⁸ Accordingly, rule 23 (1)(a) must be read against the backdrop of the Civil Parties principle pursuit of reparations and as a prerequisite for this a criminal conviction. Therefore, they are primarily interested in the Trial Chamber determining the elements of the crime as a possible basis for their civil claim.⁵⁹ In light of this “fundamental interest in securing reparations”⁶⁰, the interest in the establishment of the truth is reduced to facts and factors relevant to the determination of the guilt or innocence of the Accused as well.

Judge Lavergne in his dissenting opinion, addressing the difficulties faced, while agreeing to the need of changes and adaptations, asks: “How far can one go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of Civil Parties before the ECCC and the purpose of the trial as a whole, characterized by the coexistence of two interrelated actions, namely criminal and civil actions.”⁶¹ He recalls that the opportunity to intervene as a civil party in the proceedings is aimed at, *inter alia*, establishing the criminality of the alleged acts that

⁵⁶ Trial Chamber , Case against. Kaing Guek Eav alias “Duch”, Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses testifying in Character, 9 October 2009, No.001/18-07-2007/ECCC/TC, E72/3, para. 25.

⁵⁷ Ibid., para 26.

⁵⁸ Ibid., paras 26-27.

⁵⁹ Ibid., paras 32-33.

⁶⁰ Ibid., para. 34.

⁶¹ Ibid., dissenting opinion, para. 4.

caused the harm suffered and to identify and prosecute the perpetrators of such acts. It is within this general framework that Civil Parties may seek reparations in the course of the very same trial. Accordingly, victims may participate throughout the legal proceedings “the common purpose of which is to ascertain the truth concerning the accused’s criminal responsibility, which might also be the basis for his or her civil responsibility.”⁶² In the context of this interrelation of civil action and criminal proceedings victims participating as Civil Parties enjoy a broad set of rights throughout all stages of the proceedings and in consequence unless otherwise provided by the rules, “it must be assumed that Civil Parties have the same rights and obligations as all other parties. Any other interpretation can only be contrary to the law.”⁶³

Fearing the difficulties arising of a high number of Civil Parties in Case 002 the respective considerations subsequently lead to an amendment of the Internal Rules to the effect that Civil Parties, represented by their lawyers are confined to a single, consolidated group represented by two Co-lead lawyers in Court. Only at Pre-Trial stage the Civil Parties have the right to be represented by their lawyer before the Co-Investigating Judges. A single claim for collective and moral reparation has to be formulated for all parties. The claim must identify the harm suffered as a result of the crime committed by the convicted person and outline how these reparations will provide specific benefits to the Civil Parties to address their particular harm (Ibid., p. 47). This is criticised for effectively undermining the concept of civil party participation since it does not even reach the minimum level of rights provided for under Cambodian Law (Diamond 2010-2011; Bair 2008; Studzinsky 2011)

Since initially, the broad standing of victims as civil parties was celebrated as a success taking into consideration the *best practices* of the previous courts, the restrictive amendments were broadly discussed. While the ECCC was first celebrated for its keen approach towards victims, saying that “accepting victims as civil parties, parties to the proceedings, the PTCI took a major step forward in making tribunals places that do not simply lay blame on those most responsible for mass crimes, but

⁶² Trial Chamber , Case against. Kaing Guek Eav alias “Duch”, Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses testifying in Character, 9 October 2009, No.001/18-07-2007/ECCC/TC, E72/3, dissenting opinion, para.6.

⁶³ Ibid., para. 13.

also promote healing and national reconciliation in a meaningful way for those most affected by them.” (Bair 2008, p. 545) After the significant restriction of victims’ rights at the ECCC, the narrative describing the possibilities of victim participation shifts from victim’s individual rights and the overall effect of the courts with regard to peace and reconciliation, to involving them meaningfully and effectively. This discussion is once again closely linked to what is considered to be the limits and purpose of international(ized) criminal courts. The interpretation, discussion and critique of causes, and necessity of the institutional and legal changes of the participatory framework at the ECCC is illustrative of the perception of an alleged tension resulting from the classical image of the victim and the inter-related image of the law and its function.

In accordance with the narrative arc of increasing victims’ rights in international criminal law, before the amendments to the civil party framework at the ECCC it was held that contrary to the ICC, which is “sanitizing victims participation in the interest of justice rather than for facilitating justice in the interest of victims” (Ibid., p. 546), the Cambodian framework provides a robust mandate for victims at the court. Referring to Special Chambers of East Timor and Kosovo in their argument that civil party participation is in line with international standards. (Ibid.)

The ECCC was considered to provide a more meaningful way to involve victims compared to their standing restricted to the witness box, thereby further writing the story of progress: from paying lip service to victims too getting them closer to the center at the ICC (Ibid., p. 512). At the same time, the narrative of empowerment maintained: “Participation in these types of proceedings is a tool of empowerment [for victim civil parties]...People can tell their story, feel that what happened to them is a consideration, a recognizing that what happened to them should not have happened.”⁶⁴ It was held that victims could, given the biased Cambodian judiciary and the political influence still exerted by the Cambodian state, introduce impartiality into the trials, but at the same time, it was broadly feared that the participation as parties to the proceedings could negatively impact the accused right to a fair trial (Ibid., p. 520; Safferling 2011). Similarly to the other courts, it was the representation

⁶⁴ Gabriela González Rivas, deputy head of the ECCC’s victims unit, interview with Seth Mydans in Khmer Rouge Tribunal, Victims will not stand idly by, New York Times, June 17, 2008.

of suffering that should have had a place within the proceedings: “It allows victims to feel that their suffering is as much the focus of the trial as it was the focus the crimes.” (Bair 2008, p. 552)

„You could hear a pin drop in the courtroom, in terms of the amount of attention that everyone was giving to the Civil Parties giving their testimony – because they were speaking from their heart, and they explained how that loss of a husband, son, or family members [...] how that affected their whole life for the last thirty years. So they really brought out the impact of the crimes [...] that was brilliant.“ (Hoven 2014b, p. 690 citing a prosecutor)

Accordingly, it was alleged that „The greatest value that the Civil Party lawyer can bring, is by communicating the perspective of their clients in as real and as human way possible.” (Ibid., p. 692 citing a legal professional working at the ECCC). This is often described as the the human side of the otherwise technical legal mechanism, reminding the involved lawyers of what their work is really about:

“Prosecutors and judges agreed that the civil parties ‘brought a sort of humanity to the proceedings that otherwise they won’t have’ and reminded the other parties of the true importance of their work. Since criminal trials of mass atrocities tend to focus on complex questions of individual responsibility, proceedings would risk becoming technical and losing touch with the interests and needs of victims.” (Hoven 2014a, p. 103)

Whilst this was on the one hand appreciated to *ground* and also legitimize the proceedings, with the time criticism arouse, emphasising the rights of the accused alleging that civil party participation clog procedural mechanisms, reduce the effectiveness of the ECCC and again – rather than reminding the lawyers of the purpose of their doing, victims were said to divert attention from the legal issues at hand (Bair 2008, p. 550). It is alleged that supporters of civil party participation now have to convince others that victim participation will not disrupt the proceedings with irrelevant and repetitive evidence, outbursts and unprofessional behaviour (Ibid.). One example for the direct confrontation of the Chamber with what they perceived to be a misappropriation of the proceedings by a victim party resulted in the introduction of the obligation to be legally represented in court.

“Theary Seng is manipulating the process. I do not think that the process will be well managed if we allow [her] to stand on her soapbox... I used to think highly of victim participation, but I realize that individual victims cannot be allowed to speak in court as they are emotional. Judges do not want to hear only about their mental anguish alone, that is for a psychiatrist, not a court of

law. Common legal representation is necessary ” (Mohan 2009, p. 755 citing an interviewee)

The shift in the perception of victim participation at the ECCC, which was then legally institutionalized by collectivizing, representing and externalizing victims and their emotions, is strongly expressed:

„At the beginning of the trials, I welcomed the notion of the novel concept of victims having a formal status in the trial. I welcomed that in theory, but in practice – in my view – it was not particularly successful as a way of providing justice for victims [...] I don’t think you will find now anybody at the court any longer who says, yes it has to get louder voices for victims who are willing to extend proceedings until I don’t know when’. I think some of them say well, why did we do it?“ (Hoven 2014b, p. 690 citing a judge the author interviewed)

And also the representation of suffering and the mere appearance of victims in the courtroom was described as a pack of wolves infringing upon the fairness of the proceedings: „I had the feeling that the accused must have felt he had a pack of wolves looking at him [...] all these lawyers and the prosecutors glaring at him [...] It just didn’t feel fair.“ (Ibid., p. 691)

Another issue arising at the ECCC, which was mentioned as a reason for not introducing victim participation at previous international criminal courts, is the allegedly difficult relation to the task of the prosecution. Traditionally, in modern criminal law, it is assumed that the prosecution as a representative of the state (in international law the international community) represents the victim’s interests, thereby rationalizing the process. The tension described at the ECCC is, that now the accused is confronted with multiple prosecutors and that the prosecutions’ coherent representation of the case is impaired by diverging interests and consequently too many versions of the same case.

„Asking them [the Civil Party Lawyer] now to understand and reflect on the total picture, that’s not where their strength is, that’s the Prosecutions job.“
„We have a vision of Civil Party lawyers being you’re not the prosecutor, you’re here to speak for your clients, to express what they went through but you’re not a prosecutor.“⁶⁵

⁶⁵ Hoven (2014b, p. 692). Similarly Mohan (2009, p. 765) citing an interviewee : “During investigations, after a while the bones become beautiful and the ghosts become your friends, but the victim survivors – they can be difficult. This is because they are deeply emotional beings. We should not discount that. Many still suffer from deep psychological scarring and it can be transmitted across generations.”drawing the consequence that: “Victim civil parties are not and should not be the driving

With this argumentation, the legal restrictions of the civil partie framework are partly represented as inevitable to avoid a complete failure and the overburdening of the court by *millions of victims*. (Hoven 2014a) It is argued that the *natural boundaries of law* have to be considered and therefore, realistically one has to determine that the alleged interests of victims cannot be satisfied by a court of law and that for the collective search for truth in the sake of national reconciliation, civil partie participation was not necessary in the first place (Hoven 2014b, p. 689). More critical studies conclude that:

“Undoubtedly, there are bound to be gaps between the ECCC’s promise and its operational impact. However, these gaps should prompt a vigorous self-examination on the ECCC’s part, not a retroactive restriction of victims’ rights. Concerns about practicality and expedience, though merited, are often self-referential. They are a safe-refuge for legal conservatism: judges who may fear that victims may not bend to the will of their endeavour, defense lawyers who may fear that victims may strengthen the elbow of the prosecution, and prosecutors who may fear that victims may show them up.” (Mohan 2009, pp. 756–757)

At the same time empirical studies again suggested a discrepancy between theory and practice of victim participation:

“Based on my conversations with and observations of Cambodian victims and civil parties, I argue that the promises of victim-centrism are rhetorical devices that have little practical resonance for Cambodians. If anything, they soothe the ECCC’s affiliates (and bolster their legitimacy), not victims, some of whom complain that their token participation has “revive(d) memories, bitterness and misery”, and a “loss of faith in the ECCC.” (Ibid., p. 737)

Against this background, they, like their allegedly conservative counterparts, suggest to rely on mechanisms beyond the law to better satisfy victims’ interests and need in post khmer rouge Cambodia (Ibid., p. 738).

Once again, victims were portrayed as those who provide the human face and the cultural background to the proceedings which was initially welcomed. Then tensions with the other participants were observed, tensions that were already anticipated at previous courts. The tension with the prosecutor is said to consist in the determination of the case to proof the guilt of the accused beyond reasonable doubt and the possibly diverging strategies of the victims’ representatives. The tension that

force of the court – they are at best an auxiliary force. What is their role? Well, someone has to tell the story, but it is unresolved if this is best left to [Prosecution] witnesses rather than civil parties.”

was problematized from the very beginning, was the confrontation of the accused with multiple accusers and the infringement of his/her right to a fair trial. Furthermore, the discussions around the ECCC civil party participation framework revealed another tension, that was mainly discussed in the Eichmann trial, namely the difficulties judges describe in containing the legal proceedings given the multiple emotional stories. Apart from the tensions perceived among the parties to the proceedings, there are systematic tensions repeatedly referred to, namely, the tension between factual truths, represented by the lawyers and emotional truths represented by the victims; the tension between the legal language and the language victims speak, this is framed to potentially overburden the proceedings.

1.6. Special Tribunal for Lebanon

I will only very briefly mention the Special Tribunal of Lebanon (STL), which is mentioned to demonstrate that the introduction of a victim participation framework is a standard when installing international criminal courts. The framework at the STL is oriented towards the version of the ICC. Like article 68 (3) of the Rome Statute, article 17 of the Statute of the Special Tribunal for Lebanon and rule 86 (B)(ii) and (iii) of the Rules of Procedure and Evidence contain the requirement of an affected personal interest to present views and concerns. Likewise, there is no definition of these requirements. The Pre-Trial Judge held that when interpreting these concepts according to their object and purpose, recourse is made to jurisprudence of other international tribunals, especially the ICC given the similarity of the concepts, but also the ECCC, the Declaration and if appropriate Lebanese Law.

Contrary to the other courts, there are only few victims participating in the proceedings at the STL due to the limitation of the mandate to hold trials for the people accused of carrying out the attack of 14 February 2005 which killed 22 people, including the former prime minister of Lebanon, Rafik Hariri, and injured many others in Beirut. Therefore, the STL hardly plays any role in the discussions about victims in international criminal law, it is simply not representational.

1.7. The International Criminal Court

Against the backdrop of the described developments in international law and the criticism of the ad-hoc tribunals, victim participation was introduced at the ICC (Pena and Carayon 2013, pp. 520–521).

Initially, although demands for justice for victims played an important part in the drafting phase of the Rome Statute, the introduction of victim participation was a contested issue and the cause of victim participation was mainly promoted by NGOs and certain states (Tsereteli 2010). Especially France, Amnesty International, Human Rights Watch and the Women's Initiative for Gender Justice, pushed for the incorporation of a victim participation framework. In the words of the French Minister of Justice:

“Such is the magnitude of our mission: to put the individual back at the heart of the international criminal justice system by giving it the means to accord the victims their rightful place. A noble task, but one whose difficulty is readily appreciable by all. Since the aim is to allow the victims, concretely, to become parties to the international criminal proceedings, without undermining the effectiveness of the International Criminal Court, without diverting it from its task of law enforcement.”⁶⁶

This was said on “The International Seminar on Victims Access in the International Criminal Court” initiated by the French Government, on which draft rules of procedure were developed, which later formed the basis of the negotiations at the Second Preparatory Commission of the ICC in 1999 (Haslam 2004, p. 321). There are a number of provisions in the Rules of Procedure and Evidence (RPE) dealing directly with victims, who are distinguished from witnesses. This underlines the assumption that victims have distinct interests in the proceedings, especially distinct from those of the prosecution. The definition of victims is, in line with developments in international human rights law, broad. Like at the ad hoc tribunals, there are special provisions providing for the protection of victims and witnesses and a Victim and Witnesses Unit established. The Rome Statute, furthermore, contains a reparation framework and the unique institution of the Trust Fund for Victims. Unlike claimed in the quote of the French Justice Minister, victims cannot participate as parties to the proceedings (even though the provisions are not always clearly

⁶⁶ Opening address of Paris Seminar “Access of Victims to the International Criminal Court,” Paris, April 27, 1999; cited in Haslam (2004, p. 316).

formulated). The victim participation framework in the Rome Statute is rather unique. The plurality of approaches to victim involvement in criminal proceedings rendered it difficult for the drafters of the Rome Statute to clearly define a mode of participation at the ICC. Hence, victim participation in general, and the central provision, Article 68 in concrete, albeit generally accepted as an important positive development and acknowledged to playing a central role within the ICC framework, is no clearly defined set of rules. Consequently, article 68 (3) is an almost literal counterpart of Article 6 (b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (in the following referred to as the Declaration) which is one of the legal texts resulting from the parallel development in international human rights law which will be discussed later.⁶⁷ There was no discussion of the elements of the legal text by the Preparatory Commission. Consequently, while generally agreeing that the participatory rights of victims should at least be compliant with the Declaration and therefore with the human rights standards, there was no further specification because the drafters of the ICC Rules did not feel authorized to fill these gaps left by diplomatic exercise.⁶⁸

The concrete design of victim participation is basically left to the discretion of the Chambers defining *victims' interests* and ruling on the modalities of *presenting views and concerns* accordingly. This interpretative exercise is practised against the backdrop of balancing victims' interests with the rights of the accused, the general necessity expeditious trial and the fact that there is no explicit requirement and accordingly no specifications of participation in international law. I will discuss the legal framework and its implementation in more detail below. In this chapter it is important to note, that, similarly to the narrative shift occurring with the practical implementation of victim participation at the ECCC, now, more than a decade after the celebration of the introduction of victim participation into the Rome Statute as a milestone, the practice of the ICC is under increased scrutiny.

⁶⁷ UN Doc. A/RES/40/34 (1985), article 6 (b) : 6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:(...)

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”

⁶⁸ UN Doc. A/AC.249/1998/L.13 (1998), The report of the Inter-Sessional meeting from 19-30 January 1998 in Zutphen only mentions that: “The rules of procedure shall include provisions giving effect to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, p.117; Vasiliev (2015, p. 1147).

From the very beginning of the Courts initiation, officials claim that bringing justice to victims is one of the objectives of the Court. According to the Preamble of the Rome Statute, the rationale of the ICC's existence is to address the suffering of *millions of children, women and men who have been victims of unimaginable atrocities* shocking to the conscience of humanity in ending the impunity for such crimes by punishing its perpetrators. Recognizing what is referred to as a restorative justice mandate beside the traditional retributive purpose, the ICC organs reiterate their responsibility for "bringing justice" to victims.⁶⁹ This narrative is supported by NGOs who from time to time remind the Court of the legitimizing function of victim participation, emphasizing that by providing local ownership over the criminal process the gap between the Court and the affected communities can be bridged and this will contribute to more confidence into the system, not only the international criminal justice system, but also the local judicial systems.⁷⁰ Like at previous courts, it is now emphasised that on the one hand "the positive engagement with victims can have a significant effect on how victims experience and perceive justice and, as such, contribute to their healing process."⁷¹ On the other hand, "[V]ictims also bring a unique perspective to the judicial process."⁷² For these reasons the Rome Statute was lauded to provide "[T]oo often ignored, victims' voices" with "an attentive audience at the Court." (Little 2007, p. 365)

Nevertheless, given the occurrence of immense practical challenges in the implementation of victim participation, calls for a general reconsideration get louder (Pena and Carayon 2013; Garbett 2013, 2017; Musila 2010; Moffett 2015; Vasiliev 2015). Accordingly, a gap is detected between the limited role victims actually play in international criminal proceedings and the continuous reference to victims as the *raison d'être* of the ICC (Kendall and Nouwen 2013). Critics argue that victim

⁶⁹ ICC-ASP, Court's Revised strategy in relation to victims (5 November 2012), http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf. Accessed 30 October 2014, para 2: (...) the ICC has not only a punitive but also a restorative function; that positive engagement with victims can have a significant effect on how victims experience and perceive justice; and that it can contribute to their healing process."

⁷⁰ The Importance of Victim Participation, Submissions to The Hague Working Group of the Assembly of State Parties, Victims' Rights Working Group, 2013, http://www.vrwg.org/VRWG_DOC/2013_July_VRWG_HWG_ParticipationFINALrevised.pdf.

⁷¹ ICC-ASP, Court's Revised strategy in relation to victims (5 November 2012), http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf. Accessed 30 October 2014.

⁷² Ibid., p. 1.

participation in proceedings dealing with crimes implying large scale victimization is virtually impossible:

“(…)it may well be that victims’ participation in criminal trials of the kind that are held before the ICC, i.e., trials with massive amounts of victims, cannot be more than symbolic, [...], may be a new cause of secondary victimization.” (Van den Wyngaert, Darby 2012, p. 495)

The issue of victims in international criminal proceedings seems to be as contested as ever. There are several modes of participation developed by the Chambers and the organisational structure around participation is not fixed, stricken by financial restraints and still topic of debate.⁷³ Until now, one gets the impression that victim participation is not only discussed against the background of its design, but its effectiveness, for both victims and the Court, is contested generally (Vasiliev 2015).

“As an experiment, the attempt to institute victim-focused justice at the ICC can claim both successes and deficits. To date, several thousand victims have been accepted as participants, their lawyers have made numerous submissions in Court processes and some have spoken in The Hague — not simply as witnesses, but as a voice for their fellow victims. Additionally, the TFV has provided critical assistance to several thousand victims in Uganda and the Democratic Republic of the Congo and has suggested helpful guidelines for future reparations. At the same time, there is a widespread call for victims’ participation to be reformed to make it yield a greater impact at a lower cost. There is not yet consensus on how that should be achieved, or what that impact should be.” (Chris Tenove 2013, p. 6)

This could also be observed at the international(ized) courts discussed previously. International criminal law and its institutionalized courts are generally under closer, more critical scrutiny than in the beginning, were their implementation was mostly celebrated and faith that international criminal justice is a progress and will serve the traditional purposes of deterrence and the strengthening of the rule of law, etc. prevailed. Now, also with the empirical knowledge produced, the legitimizing narratives of deterrence, the affirmation of the rule of law, the promotion of peace-building and reconciliation, the creation of an authoritarian historical record etc. are questioned, not only with regard to the involvement of victims. (Drumbl 2007)

⁷³ Expert Initiative on Promoting Effectiveness at the International Criminal Court, Mettreux, G et al., 2014, <http://ilawyerblog.com/wp-content/uploads/2014/12/Expert-Initiative-on-Promoting-Effectiveness-at-the-International-Criminal-Court-December-2014.pdf>, last accessed 31/5/2018.

The particular procedural issues problematized in relation to victim participation at the ICC, comprising possible participation during the investigation phase (the positive impact of which on the scope of the charges is emphasized with regard to the failure of previous courts to take into account especially gender based violence), leading and challenging evidence the different modes of representation and the prolongation of the proceedings due to the number of applicants will be discussed in more detail in the outline of the legal framework. Generally, the broader problem is again identified in the possible impact of the pervasive victim centric culture on the rights of the defendant that require a “neutral, dispassionate setting in which relatively neutral, dispassionate actors go about their business” (McAsey 2009, p. 124; similarly Baumgartner 2008).

At the same time victims are appreciated for providing “local knowledge” (Carsten Stahn 2015, p. 49) helping the Chambers in their truth finding mission.

“Regularly, only a few of those involved in the proceedings are thoroughly familiar with the local context and customs that are relevant to understanding the manner and impact of the commission of the crimes and to interpreting the evidence.” For these reasons victims help to “better understand the contentious issues of the case in light of their local knowledge and socio-cultural background” (Pena and Carayon 2013, p. 524)

Finally the question was posed whether the aims associated with victim participation such as healing, peace and the best kind of restorative justice, could be achieved and if not if a reconsideration of the framework was due (McAsey 2009, p. 125).

Now, empirical studies revealed that this was exactly not the case, but that there was a significant gap between the aims and the type of justice imagined and expected by the victims (Clarke 2015). And it was concluded that “the very nature of the retributively driven juridical process may at times deliver unsatisfying results for victims.”⁷⁴ With different normative standings towards victim participation in general many authors criticised the practical implementation of victim participation at the ICC. The different normative approaches are informed of different understandings

⁷⁴ Clarke (2015, p. 290), citing Kendall and Nouwen (2013) who refer to the victimhood constructed at the ICC as juridified victimhood. Fletcher (2015) draws similar conclusions. Moffett (2015) asks what impact victims actually had on the decisions of the Chambers and his conclusions are likewise not positive.

of the purpose and limits of criminal proceedings which will be discussed in the following. The discussions are lead under the buzzword of meaningful and effective (Moffett 2015), whereas the questions of meaningful and effective for whom, or what is contested and hardly ever really specified (Vasiliev 2015). Meaningful and effective participation, in fact, seems to imply that while participation is effective for the court, in the sense of, fitting into the legal framework and still being feasible within the means of international criminal courts; it is still meaningful for the victims. The criteria for the latter however remain vague. At the ICC, meaningfully is opposed to symbolically, somewhat sensing that the factual representational frameworks seem to be symbolic in a legitimizing function for the court without actually providing victims with effective participatory rights.⁷⁵ A criticism that is brought forward not only with regard to the ICC and which is almost always linked to broader considerations of the purpose of criminal justice⁷⁶ The central question, linking this to the very confines of criminal justice posed in the discussions about victims in criminal proceedings seems to be:

“Is it possible to integrate the interests of victims through their participation in criminal proceedings, without a fundamental revision of the role and interests of victims and defendants, thereby bringing about a grave distortion of the criminal justice system? Are we experiencing a paradigm shift in the criminal process or has this already occurred?” (Safferling 2011, pp. 185–186)

1.8. From retributive – to restorative – to retributive?

Just like the ECCC the ICC is struggling how to accommodate victim participation into the legal framework and the practical functioning of the court (Friman 2009). The strong language utilized in this regard underlines the necessity to undertake a deeper analysis of the narratives. Scholars argue that issues of victim participation have led to “ideological controversies” within the court and that “what seems to be at stake ultimately is the very idea of international justice.” (Vasiliev 2015, 4, 7) This has practical implications insofar as reconsiderations of the structure of victim participation, streamlining it to become efficient and still meaningful, are

⁷⁵ For a more detailed analysis, see Part II Chapter 5.

⁷⁶ Expert Initiative on Promoting Effectiveness at the International Criminal Court, Mettreux, G et al., 2014, <http://ilawyerblog.com/wp-content/uploads/2014/12/Expert-Initiative-on-Promoting-Effectiveness-at-the-International-Criminal-Court-December-2014.pdf>. 24/5/2018.

made on the highest level – the Assembly of State Parties⁷⁷, resulting in numerous expert initiatives and NGO reports.⁷⁸ It is not difficult to imagine that these insecurities with regard to the future of victim participation and its framework led to tensions among commentators as well as among those who are working at the court.

“...those who were in favor of the system and those within the Registry with the task of trying to make it work have been slowly pushed into a corner. With ever shrinking budgets, ever expanding tasks dictated by the different and often inconsistent Chamber rulings and little remit of their own to re-structure the work more efficiently, Registry officials are put in a position where they are destined to fail, which simply fuels the skeptics and contributes to the calls to further shrink the budget.”⁷⁹

Now, current expert opinions, scholarly commentators, official courts statements and NGO expertise addressing the topic mostly negotiate to find a balance in order to close the gap between expectations, rights and resources (Ibid., p. 5) which is located between the two alleged poles of criminal justice purposes, the classical, taken for granted purpose of retributive justice understood as prosecution and punishment of perpetrators and the so called restorative complex⁸⁰ And/or to reconsider the justice concepts within the international criminal justice context generally, favoring a victim constituency in order to gain legitimacy of those most effected.

Others allege that whereas it is not about achieving restorative notions of justice (Henham 2004; Findlay and Henham 2005), it is about finding broader concepts of justice, involving victims’ interests, ensuring that justice mechanisms are responsive to victims’ needs according to a procedural justice rationale (Moffett 2015). And again others, hold that restorative justice, against the contrary assertions of the ICC itself, was never really within the mandate of the court, but what is subsumed under remedial or reparative justice, or just victim oriented justice:

⁷⁷ Draft resolution on the impact of the Rome Statute system on victims and affected communities, https://www.icc-cpi.int/iccdocs/asp_docs/RC2010/ICC-ASP-8-Res.9-Annex.VI-ENG.pdf, last accessed 9/3/2016.

⁷⁸ Expert Initiative On Promoting Effectiveness At The International Criminal Court, May 2014, <http://ilawyerblog.com/wp-content/uploads/2014/12/Expert-Initiative-on-Promoting-Effectiveness-at-the-International-Criminal-Court-December-2014.pdf>. Last accessed 24/5/2018.

⁷⁹ Redress, The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, p. 7,8; https://redress.org/wp-content/uploads/2017/12/121030participation_report.pdf. Last accessed 24/5/2018.

⁸⁰ Vasiliev (2015), Moffett deliberately calling it reparative, or victim friendly, Moffett (2015). McGonigle Leyh (2011), rejecting the term restorative justice. Garbett (2013), Musila (2010), Pena and Carayon (2013), Sarah Ehlers (2012), Tsereteli (2010).

“However, in contrast to the informal nature of restorative justice, the proceedings of the ICC are ‘lawyer dominated’, and retain a retributive focus, limiting victims’ interests as participants in deference to the two parties of the prosecution and the defence. Moreover, given the scale and the ideology which drives international crimes, restorative justice may be inappropriate as it ‘is a relatively narrow concept that requires dialogue between the offender and the victim.’ Instead the drafting of the Rome Statute and the jurisprudence of the ICC have been more influenced by UN Victims’ Declaration and human rights law than restorative justice.” (Ibid., pp. 6–7)

Similarly:

“[...] autonomous participation by victims in proceedings [...] may offer a tangible avenue for expressing emotional suffering but it does not necessarily make a process restorative. Therefore, it is important to distinguish between victims’ procedural rights within criminal trials and restorative justice processes. [...] extensive procedural rights for victims within the framework of a traditional criminal justice system may be granted without necessarily transforming that system into a restorative one. [...] These domestic proceedings, while not adopting a restorative justice approach, most certainly adopt a victim-oriented approach (in an attempt to meet the needs and concerns of victims) and it is this approach which most closely resembles the victim schemes at the international courts. Thus, the application of the phrase ‘restorative justice’ to the international criminal law construct is misleading.” (McGonigle Leyh 2011, p. 63)

Summarizing the current debate, there are streams suggesting to return to the retributive mandate, streamlining victim participation consistent with the efficient and effective operation of the court according to what they understand to be its core functions (Vasiliev 2015; Safferling 2011; Hoven 2014b; Van den Wyngaert, Darby 2012). Streams that generally accept this core mandate but claim that it has to be broadened in order not to be perceived as paternalistic, or generally to be in line with international human rights standards and international developments (McGonigle Leyh 2011, p. 63). And again others who opt for a re-conceptualization of international criminal justice within a governance framework taking into consideration a communitarian approach to justice, in which victim-constituency is the key factor for perceived legitimacy. The latter opt for a harmonization of the dualistic conception of retribution and restoration (Findlay and Henham 2005; Lambourne 2008).⁸¹ The main-stream within scholarly debate and also on the institutional level seem to be in favor of a reversion to what is considered to be the core function of international criminal law, namely retribution (Vasiliev 2015; Van den Wyngaert, Darby 2012). With regard to victim participation this implies a turn to

⁸¹ Criticising that the distinction of retributive and restorative justice is oversimplified.

collectivization, representation and externalization, as well as it was the tendency at the courts discussed previously:

“The scaling down of the grand restorative ambitions in developing the participatory scheme is the most affordable of the sacrifices for the Court; this is a key lesson that the ICC must have learnt after the protracted journey of rediscovering itself as a primarily retributive justice institution. ” (Vasiliev 2015, p. 1139)

Since the critique of the retributive focus of the first courts and the respective disregard for victims as subjects with an active role in the proceedings and with interests going beyond those of the prosecution was the alleged reason to include victims at the ICC and celebrated as a progress in the more or less linear plotting of the success story of international criminal law, it is peculiar that the proposed way to go now is backwards without taking the previous criticism into consideration. Staying within the tracks of the tale of international criminal justice, it is hence due to have a closer look at the concepts of retribution and the purposes considered within international criminal justice generally, in order to refine the problematic of the justice-gap, the discrepancy of claim and reality.⁸²

2. Conclusion

There was a shift insofar that at Nuremberg, the Prosecution did not face major opposition when deciding on their strategy to leave out victims as witnesses, and in the Auschwitz trial, it was normal that there was no psychological support for victims while nowadays there is a strong lobby and support for victims' right that can rely on human rights law and jurisprudence when claiming a broader standing for survivors in the proceedings. The Prosecution has to justify its strategy, the scope of charges etc. with respect to its effect on victims and even more than before, “the victims” became central for legitimizing international criminal law rhetorically (Clarke 2009, 2015). The abstract victim (Kendall and Nouwen 2013; Fletcher 2015 calling it 'imagined victim') became central to the international criminal legal stage (Karstedt 2010). At the same time, the role of victims as participants in the proceedings remains contested and the traditional criminal justice conceptions did not change,

⁸² Damaska (2009); This discrepancy is observed by many others and will be outlined in more detail below.

therefore, the discussions around victim participation evolve around the core questions of why, how, in whose name and for whom criminal legal proceedings are conducted and judgements are rendered. (Van den Wyngaert, Darby 2012) Regarding the latter questions there was no major shift, whereas the need to involve victims became more prevalent in contemporary discussions of atrocity trials, the underlying assumptions and images associated with victims remain the same. “The Victims” are granted access – they are beneficiaries of the proceedings, they are an extra, providing the *human face*, the *emotional aspect*, and *local knowledge* but generally trials could do without them. Relying on *objective truths* rather than *subjective memories*. “The Victims” help to create a story that can serve educational and restorative purposes. The latter are at the same time framed to not belong to the classical purposes of law – being *political* (see criticism Eichmann trial and the respective submissions by the judges in Jerusalem and at the ECCC). At the same time, something is missing without victims, an unease is felt when they are not involved (Nuremberg, ICTY/ICTR). This led to increased advocacy for a broadening of the scope of victims’ rights and the rhetorical re-iteration that victims are the centre of international criminal proceedings, emphasising the central role of victims in international law and transitional justice. The discrepancy between the rhetorical iterations and the practical implementation is underlined by the insistence on participation to be meaningful as opposed to be purely symbolic. And still, victims are associated with extra-legal mechanisms like truth commissions, which are said to better serve the victims’ alleged desire to tell their story. And involving victims is always a broadening of the purpose of criminal proceedings, which is generally jeopardizing the well-functioning, efficacy, sobriety, objectivity and impartiality of the endeavour. To achieve this ideal of efficacy, sobriety, objectivity and impartiality, it is discussed to return to the retributive justice rationale, which is associated with the roots of criminal justice at Nuremberg, providing it with a “victim friendly” touch, achieved through collectivization of the alleged claims and interests of victims. Going “back to the roots, getting rid of the restorative complex” (Vasiliev 2015) is said to ensure the ICCs efficiency and prevent victims’ frustration caused by the unrealistic expectations that were raised by the claims of bringing truth, justice and reparation to victims (Ibid.). Questions of the structure and legitimacy of international criminal law and jurisprudence seem to be at the heart of the discussions of victim participation

within international criminal justice. Victim participation is related to restorative justice concepts, or victim friendly versions which are conceptualized as being a “more” to retributive concepts which are described as the classic purpose of criminal justice and international criminal justice. At the same time restorative and retributive justice rationales are dichotomised and consequently described as not fully reconcilable in an international criminal court. (Clarke 2015) And, to make matters even more complex, international criminal law, as opposed to domestic criminal law is undertheorized since it was prevalingly shaped by practical political initiatives that made use of windows of opportunities for the advancement of international criminal law in international politics rather than developed from the theoretical sketch. (Koller 2008) Accordingly, there is no fixed understanding of the theoretical foundations of international criminal law and some hold that it is a matter of faith rather than sound theoretical justification. (Ibid.) Within this structural and theoretical tension, victim participation is located and negotiated. And analysing the practical implementation a *justice gap* is observed between legitimizing theory and practice which is then ascribed to the tension between the two conceptions of justice.

Chapter 2: The justice gap

1. Legitimizing International Criminal Law

Tracing the developments of victim's role and participation in international criminal law, in the previous chapter it became clear that the discussions on the role of victims seems to be closely linked to discussions on the legitimacy of international criminal justice in general. The participation of victims is said to broaden the purpose of the courts. Consequently, the purposes of punishment which are seldom distinguished from the purpose of the proceedings, as they are negotiated within the victim participation narrative, go from retributive (neglecting victims' interests (Nuremberg/Tokyo and the ad hoc tribunals) to reparative/restorative or more reluctantly just victim-oriented concepts (ECCC/ICC).

And now, with the observation of difficulties in the implementation of the different victim participation frameworks, the tendency is to demand a return to a slightly modified retributive justice rationale (discussing collectivization, representation and externalization of victims).

While within the discussion of victim participation and the victims' role for the courts, the either retribution (perpetrator/public order) or restoration (victims/society) logic (Mégret 2015, p. 38) prevails, the above mentioned dichotomisation of justice approaches seems a side issue in the theoretical considerations of international criminal justice as a whole. This reveals that the discussions regarding the role of victims for, and in international criminal law are theoretically unfounded, or at least uncorroborated, when it comes to the reference to alleged purposes of punishment.

Interestingly enough, retribution is commonly rejected as a (sole) purpose of punishment by those discussing legitimacy of international criminal law generally without putting a focus on victims. For this reason it is worthwhile to take a step back and look at the problematic of legitimacy in international criminal law more generally in order to put the discussions on victim participation into a context. Hence, in the following I will proceed by tracing the doctrinal discussion on

purposes of punishment and the legitimacy of international criminal courts more generally, in order to refine the position of victims within the narratives of international criminal justice by differentiating the prevailing either/or logic and the dichotomization of restorative and retributive justice.

In these discussions, just like in domestic contexts, a multifaceted range of theories and approaches are discussed regarding the question of the why and how of international criminal law and punishment. Most doctrinal analysis of purposes of punishment in international criminal law start by discussing the classical domestic theories of punishment, such as retribution and utilitarian approaches like deterrence, general and specialized negative and positive prevention (Ambos 2013b, p. 67 et seqq.). The discussions about legitimacy and purposes of punishment then proceed to either confirm the general applicability of classical theories (Akhavan 2001; Werle and Jeßberger 2016, p. 49 et seqq.), and/or discuss its limitations given the criminology of war crimes and crimes against humanity, the tension of peace and justice efforts in post-conflict societies and the general lack of empirical verification (Nouwen 2012).

What is striking is that, when considering purposes of punishment and the legitimacy of international criminal justice and courts, a general lack of theorization is symptomatic. This is characterized by a negligence to seriously consider discussions concerning domestic philosophical and legal policy approaches to the purposes of criminal law. Consequently, this uncritical application of domestically developed theories leads to a flawed theoretical debate on the international level. At the same time, the discrepancy between theorization and empirical validation seems to be just as disillusioning in the discussions on legitimacy of international criminal law in general as within the discussions on victim participation. Consequently, the practice of international criminal law and its alleged effects are mostly based on uncritically, taken for granted assumptions. When being confronted with theoretical scrutiny and/or empirical analysis, there again appears a gap between claim and reality of international criminal justice. While this seems to be commonly recognized, it is by some valued as the triumph of faith over rationality necessary to realize a project like international criminal justice in an international environment dominated by Realpolitik (Koller 2008, pp. 1049–1050). Others call for general reconsiderations

and criticise the belief that the “proliferation of criminal justice institutions as constituting a self-evident cause for celebrations” as a result of complacent thinking (Drumbl 2003, p. 4)

In order to address these shortcomings, a distinction between the criminal justice approach and the security, peace and human rights approach is drawn to not limit the discussions to classical criminal justice theories (Ambos 2013a; Ambos 2013b, pp. 68–69). In an attempt to fill the gap, different strategies and theoretical considerations are discussed, a very prominent of which is establishing a victim constituency, a victim-oriented purpose of punishment relying on the internationally acknowledged rights to truth, justice and reparation and victimological approaches to criminal justice (Drumbl 2003; Möller 2003; Stehle 2007; Findlay 2009; Moffett 2014).

These narratives implicitly build on the conceptions of the rule of law – truth and justice, the subject and violence and incorporate a distinct notion of trauma and healing. Indeed, it is problematic, that given the lack of scrutiny these implicit conceptions mostly remain unchallenged and nevertheless are highly influential in structuring relations in international criminal law.

By stepping out of the narrow discussions on victim participation and its entanglement with alleged purposes of international criminal justice mechanisms, it ought to become clear that victims play a distinctive role in justifying international criminal law by filling a gap in legitimizing international criminal justice generally.

1.1. Classical Theories and their gaps

The following elaborations will sketch the concepts drawn upon to legitimize international criminal justice as they are discussed in doctrine. Since, deep theoretical considerations of the concepts are missing in the discussions on international criminal justice, the focus will not be to comprehensively elaborate on the philosophical concepts but will be limited to the discussions represented in international criminal legal debates. Portraying these debates helps to carve out the problematic of legitimization in international criminal law and the peculiar role of victims therein in order to subsequently scrutinize the theoretical flaws and the taken for granted assumptions underlying the legitimizing narratives.

1.1.1. Retribution and deterrence: always referred to while highly contested

Retribution was explicitly referred to by both, the ICTY and the ICTR in their sentencing judgements. Although highly contested, it is still referred to in almost all discussions concerning international criminal justice. Retribution is derived from the part of the preamble of the ICC stating that most crimes of general concern to the international community must not go unpunished. It is alleged that genocide, crimes against humanity and war crimes are just so horrible that the mere fact that they are committed warrants punishment regardless of any other possible effect of the punishment (McGonigle Leyh 2011, p. 60). This is also referred to as absolutist theory. Retributivism in its pure form, as deserved punishment and an end in itself, associated with the Kantian concept, justifies punishment to re-institute elementary justice as just desert regardless of any societal effect, positive or negative.⁸³

This notion is broadly rejected within domestic and international criminal law⁸⁴ and is described to be referred to when there is no other justification left (Loick 2012, p. 32). Theorists who nevertheless evoke retributivist theories for international criminal law reconceptualize the “pure” form into “relational” theories with a focus on the alleged relational structure lying in the relation between the offender and the victim. This relation it is said to then “give[s] rise to a duty of a punishing agent, owed to the victim, to punish the offender. The legitimate authority of the punishing agent derives from its reciprocal relations with the victim to whom the duty to punish is owed and with the offender from whose wrong the right to punish derives.”⁸⁵ This approach deviates significantly from the “traditional” retributive theory in which the center of attention is just not the victim, but the legal order as such, which is violated and has to be re-affirmed through punishment (Aldana-Pindell 2004, pp. 620–622). Furthermore, it anticipates the “victim constituency”,

⁸³ The Kantian exemplification is, that “Even if a civil society resolved to dissolve itself with the consent of all its members--as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world--the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.” Kant (2005).

⁸⁴ Koller (2008), stating that it is fundamentally incompatible with human rights standards; Others try to develop a retributivist theory if ICL Haque (2005); Greenawalt (2014).

⁸⁵ Haque (2005), p. 278.; this conception is interesting against the backdrop of the alleged incompatibility of retributive paradigms and victims, which is postulated in the discussion of victim participation and the retributive vs. restorative debate.

already indicated, and is indicative of the important role victims play in legitimizing international criminal justice in the context of a theory that is commonly described as victim unfriendly. I will return to the special role of victims further below.

One of the main argument which is particular for crimes tried at The Hague, quoted both for and against retribution, is, that genocide, crimes against humanity and war crimes are just so enormous and often described as unimaginable, that they can never be adequately addressed given that – “the balance of the suffered wrong is plainly unthinkable” (Ambos 2013b, p. 68). At the same time, the crimes appear to be just so gruesome that they warrant punishment regardless of any possible effect. To this effect, “good reason retributivism” declares:

“As the competing retributive theories all reveal, the most that retributivism can provide is a powerful, but non-exclusive, reason to punish. According to this value pluralist understanding, the wrongdoing of the offender provides a *prima facie* argument in favour of punishment.” (Greenawalt 2014, p. 978)

Retributivism with its underlying de-ontological logic is thus relied on, because it provides intuitive reasons for punishment without arguments and is therefore just one, non exclusive reason. Consequently, when referred to in the discussions, it is rather understood as “an expression of the determination to not leave these crimes unpunished” (Ambos 2013b, p. 70). Aside from that, retribution is often referred to in one sentence with ending impunity, which is then connected to the alleged deterring effect of international criminal courts. This lack in precision referring to already established concepts, illustrates the above mentioned undertheorization, the concept is not seriously considered rather “it is just assumed” (Drumbl 2003, p. 14).

In this vein, Osiel holds that retribution is a powerful intuition in the face of such horrendous crimes, “if ever there were an “easy case” (in the moral sense at least) for punishment, surely this is it.” (Greenawalt 2014, p. 978) Consequently, authors who understand retribution in this more traditional way refute it as “inherently anti-empirical, drawing its strength from an explicit appeal to a moral order for the universe” (Koller 2008, p. 1025). Most scholars who analyze purposes of punishment and legitimacy of international criminal law hold that other theories are better suited to explain and legitimize the work of the courts and the development of international criminal justice (Ambos 2015; Ambos 2013b, p. 71 et seqq. ; Drumbl 2007).

Given the foregoing, retribution as a justification for international criminal courts seems to play an ambiguous role. On the one hand, in the founding documents of international criminal courts, it is referred to as one of the primary justification for punishment and perpetuated within the discourses of legitimacy. It seems to be understood in a sense that punishment is just an imperative of elementary justice (Werle and Jeßberger 2016, p. 117). On the other hand, current legal philosophical discussions, both domestically and internationally, retribution is described to be an outdated, anti-modern justification. The reference to retribution without consideration of the respective critique demonstrates the serious flaws in the theorization of international criminal law. And this, in turn, shows that legitimizing narratives of international criminal justice do not scrutinize taken for granted justifications. As it is the case with other penal justice theories discussed below, it indeed seems as if retribution is relied on due to its de-ontological and intuitive character. And thus it evokes the impression that the international criminal courts' practice is a manifestation of faith. The imagination of a just international legal order based on the rule of law both within the sovereign national states composing this order and internationally is the basis of this faith. This just legal order has to be rectified vis á vis the wrongdoer symbolically (Tallgren 2002, p. 580).

1.1.2. Deterrence

Deterrence, in both its manifestations (specialised and general negative prevention), relies on the rational ability of individuals, be it the individual perpetrator or the individuals in a community, to freely decide whether it is worthwhile to commit a crime taking into consideration the possible punishment. The rationale is twofold, firstly it is claimed that holding individuals accountable of war crimes and crimes against humanity on an individual level prevents the perpetrator from recidivism for once because s/he is incapacitated through imprisonment for a considerable time and also through stigmatization (specialized negative prevention) (Burkhard 2010, pp. 35–36).

Beside special deterrence aimed at the individual perpetrator, it is further argued that international criminal trials, even of a small number of high ranking perpetrators, might have a general deterring effect. According to this view, international

prosecutions can stigmatize criminal behavior.⁸⁶ The deterrent effect should accordingly work in preventing potential war criminals from committing the crimes in question, and warning head of states with the message that impunity is no longer an option and that they are never safe from prosecution (specialized and general positive prevention) (Wippman 1999).

Deterrence then faces the same criticism other purposes face when being confronted with empirical provability.⁸⁷ The empirical record regarding deterrence is at least inconclusive domestically and even more so, internationally (Zolo 2004, pp. 730–731). This is partly attributed to the high selectivity and the related lack of a convincing threat of prosecution on an international level (Koller 2008, p. 1027). Another criticism pertains to the special criminology of war crimes, against the background of which the assumption regarding perpetrator rationality is generally unproven and difficult to maintain (Drumbl 2007, p. 17). The collective nature of violence creates an environment in which the behavior of the individual is conformist rather than deviant which then inverts the rational calculation of costs and benefits since in the very situation of the commission of the crime, it would probably be more costly to adhere to social norms that were valid in peaceful times. In this situation of upended social order international criminal law asks individuals just not to act conformably.⁸⁸ Therefore authors postulate that a discursive shift is due to recognize the criminological insight of mass violence and their collective

⁸⁶ Gilligan (2006); Akhavan (1998), p. 749; also cited in Wippman (1999).; General deterrence is difficult to distinguish from the purpose of strengthening the rule of law, norm stabilization or general prevention in its positive form. Whereas the former relies on the negative deterring effect on the community, the latter relies on positive impulses re-enforcing, stabilizing, or establishing the rule of law and a general acceptance of human rights standards. These theories will be discussed in the next part.

⁸⁷ Ku and Nzelibe (2006), Ku and Nzelibe even suggest that International Criminal Tribunals have an exacerbating rather than a deterring in the case of politically indispensable individuals and a very low to no deterring effect in most of the cases falling under the mandate of the Tribunals.

⁸⁸ Neubacher (2006); Reuss (2010) Drumbl (2003). Sloane (2006). This applies to the case of Adolf Eichmann famously characterized as the incarnation of the banality of evil by Hannah Arendt – the so called “Schreibtischtäter”, as well as to soldiers and paramilitaries in the former Yugoslavia who among other factors rationalized their behaviour as self-defense and probably even more so to current cases at the ICC where former child soldiers who were abducted and indoctrinated by violent conditioning stand trial. On the other hand the question arises, and is hardly ever addressed, who is the primary addressee of the deterring message. Is it the perpetrator on the ground, or rather head of state, chief of military and the like. If the latter is the case, they are called upon not to create a situation of upended social order of collective violence. Given the selectivity of the prosecutions it is still doubtful if the alleged deterring effect is existent. Furthermore, the question arises, if there is such a thing as clean warfare, or if this is just an illusion that is legitimated through the distinction made in humanitarian law. I will come to this critique later, Dauphinee (2008).

nature in the context of proceedings dealing with international crimes at the Hague (Drumbl 2011).

Similar to retribution, the discussion on deterrence amounts to the conclusions that it relies on empirically unproven assumptions, which are theoretically highly controversial. Therefore, albeit called upon to justify punishment in international criminal law, it has limitations in and of itself and with regard to the particularities of the crimes in question this becomes even more obvious. Nevertheless, deterrence, just like retribution, is still regarded to be one of the primary justifications in international criminal law (Ku and Nzelibe 2006, p. 779; Wippman 1999). The fact that deterrence is nevertheless defended by saying that there generally is a deterring effect – it is just not enough to have a visible effect– yet, again demonstrates the faith-like character of justification. The international community is called upon to invest more in the face of empirical failings:

“Instead of despairing over the prospects of deterrence, the international community should enhance the probability of punishment by encouraging prosecutions before national courts, especially of third states, by making ad hoc tribunals effective and by establishing a vigorous, standing international criminal court.” (Meron 1999, p. 201)⁸⁹

The belief is, that principally international criminal law and punishment works, just not yet, it has to be steadily improved according to its inherent penal- legal logic and one day the effects will be visible. The gap between theory and practice is bridged by believing even harder (Nouwen 2012, p. 344).

1.2. The civilizing mission in International Criminal Law

Against the backdrop of the described limitation of the traditional criminal legal theories, already the criminal philosophical discussions dealing with Nazi crimes advocated a stronger focus on norm stabilization/rehabilitation. In the German debate it is referred to as “positive Generalprävention” (positive general prevention) which resembles theories of expressivism in the non-German speaking scholarly discussions.

⁸⁹ This is a powerful illustration of what Nouwen referred to, when she describes the justification of international criminal law by international criminal lawyers – true believers never stop believing and people who doubt are recommended to believe harder, Nouwen (2012).

A purpose indicated in the preamble of the Rome Statute, which is associated with positive general prevention, is the promotion of the rule of law. In the debate on purposes of punishment, proceedings and legitimacy more abstractly, it is discussed as the more general creation and reinforcement of an international awareness of law – more specifically humanitarian law and human rights law – as an aspect of said rule of law. In this context, the preventive function of international criminal law and its broader socio-political effect in the targeted societies is addressed.⁹⁰

The first dimension of the theoretical debate is more philosophical and asks if there are already established norms and fundamental values on an international level that could be stabilized and with which legitimacy these norms are created/reinforced internationally, assuming universality. These values are simultaneously those underlying the above mentioned symbolic retribution and are the norms the international order ideally should be based on.

The question which socio-political functions the international criminal courts should, and could, fulfill nationally is related to the discussion of an international order. This relates to the discussions about the functions of international criminal court within the toolkit of transitional justice and its relation to other mechanisms. Here, victims and their position within societies and states play a major role. In this respect, the “alternative” legitimizing narratives pivotally rely on victims to fill a gap left by the “weaknesses and precariousness of other constituencies.” (Mégret 2015, p. 38)

1.2.1. International criminal law as ultima ration in human rights protection

Justifying a supranational punitive authority of international criminal law normatively proves to be a difficult philosophical question. A common normative ground for punishing, which is taken for granted within the nation state, but not necessarily on an international level, has to be constructed.⁹¹ While mostly this common ground is just assumed, as became clear from the foregoing, Ambos

⁹⁰ Burkhard (2010, p. 38), In the German terminology the preventive purpose is implied in the name: positive Generalprävention.

⁹¹ Loick (2012), also summarized the critical voices within domestic criminology who question punishment as such.

explicitly formulates this normative foundation which in turn is indicative of the purposes of punishment assumed.⁹² The normative foundation of international criminal law is mostly derived from a combination of human rights law and its alleged universalist foundation in human dignity.⁹³ This is traced back to the Kantian idea, according to which human dignity is the source of fundamental human (civil)rights, which ultimately have to be enforced by (international criminal) law (Ambos 2013a, p. 304). This vision is internationalized by Kant's conception of eternal peace founded on a world order constituted of republican States that guarantee the liberty and equality of their citizens and accept "inalienable rights" and on the international level a world citizen law (Ibid., pp. 305–306 citing ; Kant 2013). Interpreted in modern language, the rights of the citizens equal human rights and permanent peace is predicated on its recognition and respect which necessitates that violations have to be stigmatized as wrongs and consequently punished (Ambos 2013a). "Following Kant [...] scholars have argued that the State and the international community is called upon to protect the human dignity by way of criminal law." (Ibid., p. 306; similarly Merkel 1996; Gierhake 2005) Human dignity is furthermore understood to be the moral source of subjective rights in international law which hence have to be enforced by international criminal law.⁹⁴ Or, in the words of Bassiouni: "The shield of human rights protection necessitates the sword of international criminal law enforcement." (Bassiouni 2013, pp. 46–47)

According to this understanding, human rights, justice and a cosmopolitan notion of an international community that is bound by common values are accepted as universally and interculturally recognized principles. The development of international criminal law and the respective establishment of courts is therefore regarded as a progress in civilization (Neubacher 2006). The ICC is regarded as an

⁹² Ambos develops in a first step the normative foundations of the punitive power in international law to then, in a second step develop what he calls a combined Rechtsgut-harm theory: Ambos (2013a); Ambos (2015).

⁹³ Arbour (1997, p. 531), describing the practical challenges in the approach to "marry" international law which is consensual and criminal law which is essentially coercive; Emphasising the civilizing mission and the universality: Cassese (2011);

⁹⁴ Garapon (2004); Orentlicher (2007) who reconsiders her strong claims by emphasising the role of victims and a cross-cultural perspective; Findlay and McLean (2007), as mentioned above the foundational stone of considering individual rights within international law were said to have been laid at Nuremberg. This was closely related to the beginning of a modern human rights movement – which will be discussed with regard to victims'rights below. Teitel (2014), Clapham (2003), describing the introduction of the individual into international law as a paradigmatic shift.

endeavor of global civil society, which is thereby constructed as the constituency, establishing the rule of law against political power and arbitrariness (Safferling 2004, p. 1475). Parallel to the justification of modern liberal state systems it is alleged that the

“[C]riminalization of the most heinous human rights infringements and prosecution of these norms relies on the international social contract of the global civil society. Every individual has a legal claim to be protected in these core rights. The protection is one of criminal law.” (Ibid., p. 1487)

This universal normative basis then legitimizes international criminal legal interventions into state sovereignty. Accordingly, “the history of the development of human rights as individual subjective legal claims is thus a history of failure of national states.” (Ibid., p. 1475) Adopting a functional account of sovereignty, the imposition of international criminal law is to be accepted by nation states, when they fail to protect, or even violate the basic rights of their people.⁹⁵ The aim of prosecutions in this context is „to recover the universality of law, its equal application to all, by re-establishing individual rights.” nationally and internationally (Humphrey 2003, p. 498).

From this combination of collective (world order, international community) – individualistic (subjective human rights) aims, the function of international criminal courts is derived, developing a combined Rechtsgüter-harm theory of punishment, determining which crimes fall under the realm of international criminal law (Ambos 2015). The function of international criminal law strictu sensu would then be “to protect fundamental Rechtsgüter that are individualistic and collective at the same time by way of preventing actual harm to these Rechtsgüter.” (Ibid., p. 324) Punishment, accordingly, aims at creating and re-inforcing a universal legal consciousness and thereby constructing a cosmopolitan identity which could be understood in a positive general preventive way.

“The ultimate value of international criminal law may rest not in its functions of retribution or deterrence, but in its role in identity construction, in particular in constructing a cosmopolitan community identity embracing all of humankind.” (Koller 2008, p. 1060)

⁹⁵ Altman and Wellman (2004, p. 51), comparing the state to parents and the citizens to children to then draw the analogy to the intervention of the state when the basic rights of the child are violated.

At the same time, this concept aims at reconciliation of the affected societies also referred to as a restitutive effect of punishment, forming a new national identity, which is conformant with the vision of said cosmopolitan international world order (Altman and Wellman 2004).

Admittedly, international criminal justice as “the gentle civilizer” (Koskenniemi 2002) of the world and the Kantian vision of eternal peace seems to be a compelling thought, especially because it legitimately always remains to come. Which, in turn, renders it close to the, above mentioned, tendency to believe in an idea rather than to consider empirical consequences, let alone, political implications of this idea. But, one does not have to refer to the dialectic of enlightenment to reveal the inherently destructive notion of this faith. Post-colonial, feminist and critical legal scholars reveal the inherent exclusionary epistemic effects the reference to a universal, the human, humanity etc has. Therefore, the appeal to a peaceful cosmopolitan international community consisting of democratic states protecting international human (civil) rights with penal means as an aim to be pursued, an order to be constructed, is based on very problematic and violent foundations.⁹⁶

1.2.2. Expressivism

Whereas expressivist motives in international criminal law are not new, the articulation as an expressive purpose of international tribunals is. Apart from the alleged focus on retribution at Nuremberg, the expressive function of the court and the intended message was a central concern for the prosecutors:

“The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason. [...]”⁹⁷

⁹⁶ I will scrutinize these foundations in the following chapter.

⁹⁷ "Second Day, Wednesday, 11/21/1945, Part 04", in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947. pp. 98-102.

As a reminder, the boring proceedings relying on documentary evidence were at that time already regarded as counter-productive to send the intended message. By implication, Nuremberg was described as a retributive court, but other purposes were always also considered and valued. It was attended to educate the German people and have a preventive function as well as communicating the power of law over politics.

Expressivism is described to be “an attempt to theorize courts’ potential to send messages as a key feature in thinking about the relationship between normative legitimacy, support and utility of international trials.” (Meijers and Glasius 2013, p. 720) As such, expressivism is the corresponding theory to the claim of international criminal justice to contribute to the re-enforcement of human rights and provisions of international law more generally in elaborating on the discursive effect of international criminal proceedings relying on a social constructivist rationale (Drumbl 2005, p. 592 et seqq.). Accordingly, law is understood to reflect “society’s values, what it esteems, what it abhors.” (Amann 2002, p. 118) This does not only apply positively, in a re-enforcing manner, but also negatively, in the condemnatory pronouncement which finally carries consequences. It is alleged that crimes against humanity and war crimes have all too long gone unpunished which in turn striped the norms of authority which is now re-installed through effective criminal prosecution. As a Judge at Nuremberg emphasised: “only by punishing individuals who commit [crimes against international law] can the provisions of international law be enforced.”⁹⁸

While the classical purposes of punishment and criminal proceedings are undermined by the particularities of international crimes, expressivism would still be a valid reason to establish international criminal tribunals with punitive power (Wringe 2006, p. 160).

“Over time, punishment by international criminal tribunals can shape as well as express social norms. And the international sentencing process can reinforce

⁹⁸ Kirsch, Phillip, Applying the Principles of Nuremberg in the ICC, Keynote Address at the Conference “Judgment at Nuremberg” held on the 60th Anniversary of the Nuremberg Judgment, 20 September 2006, p. 3, https://www.icc-cpi.int/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf, last accessed 25/5/201.

and vindicate those norms even if it cannot, alone, realistically be expected to deter or fulfil retributive aspirations held by each affected local constituency.”⁹⁹

Therefore, expressivism can be located between the deontological logic of retributivism and the consequentialist approach behind deterrence (Amann 2002, p. 120). The difference is that expressivist theorists do not see their approach as a self-sufficient justification of punishment, but analyse expressivism as a function and essential characteristic of criminal law as a social institution (Sloane 2006, p. 38). As a normative matter, expressivist scholars rely on a distinct moral context of human rights and a cosmopolitan notion of international law described previously. The latter understanding presupposes a very clear idea of what could be a right message and what is the wrong expression of international criminal law. This implicit underlying morale could be observed when carving out what is a proper international court in the comparison of Nuremberg and Tokyo, for example. According to a modern understanding of law, the court sends the message of *rationality*, *sobriety* and *impartiality* in the face of violence, by confining power with reason.

In this context Osiel analyses the dramatic potential of atrocity trials and their influence on collective memory. He emphasises the potential of criminal trials to “contribute significantly to a certain underappreciated kind of social solidarity arising from reliance on procedures for ensuring that moral disagreement among antagonists remains mutually respectful, within the courtroom and beyond.” In so doing, trials can be “public spectacles and consistent with liberal legality” and constitute “moments of truth” for both, the individual and the collective (Osiel 1997, pp. 2–3).

The basic criticism of these kind of messages and the assumption that they are universally applicable and valuable will be discussed in the following parts, for now, the scepticism remaining within the confines of the general acceptance of these paradigms will be addressed. The first critical issue is, which community is, or should be, the primary referent of international criminal proceedings? Is it the cosmopolitan international community referred to when adopting Kant’s vision of eternal peace? Is

⁹⁹ Sloane (2006, p. 56). Sloane expressly distinguishes between proceedings and punishment while focussing on the analysis of the latter.; Reuss (2010), Reuss discussed civil courage as a purpose of international criminal law and proceedings, saying that pure norm stabilization should not be enough and that rather, in the sense of positive general prevention, with a focus on prevention, people should be educated to show deviant behaviour in situations of state induced terror. Möller (2003), would not go as far as asking for civil courage, but wants that criminal law intends to establish another normative level, she calls her approach “educative Systemprävention”.

it the societies affected by the violent conflict in question? Is it the grassroots level? Is it victims within the society? Or rather the perpetrators who are the focus of retributively designed courts? It seems as if the assumption of a universal character of the norms expressed go hand in hand with the assumption that the potential addressees of these universal norms do not matter, just because they are self-evidently good.¹⁰⁰ Or, in the words of Rama Mani:

“Trials and truth commissions of some form are considered to be ubiquitously good, or at least so clearly well intentioned and firmly grounded both morally and legally that their outcome cannot but be positive.” (Mani 2005, pp. 514–515)

At the same time, a discrepancy appears between the interests of states “that maintain strong commitments to emerging international human rights norms” and the interest of the concrete state affected, and another gap between the international and national interests and different interest groups, victims, veterans, and other individuals (Sloane 2006, pp. 11–12). Henry calls this the gap between law in rhetoric and law in action (Henry 2010). As described above, there always seems to be a disconnection between the courts and the constituent community, be it the collective or individuals, a gap that is raising fundamental questions about the legitimacy of the criminal proceedings. Given this gap, the norms associated with international criminal law and punishment do not necessarily correspond with and therefore are abstracted from the moral universe of the community and individual in the respective post-conflict environment (Tallgren 2002, p. 582). This is not to say that mutual respect and the adherence to human rights is not rooted in the respective societies. It might just not be a priority and the appellation of these “universal values” might be misplaced or even ridiculing against the background of the socio-political and material societal situations and given the deeply rooted injustices related to colonial and post-colonial entanglements.

“No one who attends transitional justice conferences in post-conflict societies can long fail to notice the near total disconnect between the discourses of local participants, often focussed in historically specific grievances about who did what horrible thing to whom, and of we more “cosmopolitan”, peripatetic

¹⁰⁰ McEvoy (2007, p. 414) McEvoy distinguishes between thick and thin theories, whereas “thin writings on law tend to emphasise the formal or instrumental aspects of the legal system. They are inclined to assume the self-evident rightness of the rule of law.”

academic consultants, touting larger lessons drawn from other countries recently facing similar predicaments.”¹⁰¹

Furthermore, the weakness of all applied theories, namely the selectivity in prosecution also weakens the universalist, cosmopolitan, humanitarian statement invoked by expressivists. Therefore, in conclusion,

“each of the justification is compromised by the intractable selectivity, pervasive discretion, and excruciating political contingency of the process of international law. Although all domestic criminal law bureaucracies are susceptible to contingent enforcement, the susceptibility of the international criminal law bureaucracy is materially greater. Choices of which atrocities to judicialize and which individuals to prosecute are so deeply politicized that it is problematic to pretend that they are in any way neutral or impartial, two characteristics often attributed to and propounded by law.”¹⁰²

Despite this general legitimacy gap in international criminal justice, the prevailing paradigm of prosecution and punishment remains in large parts untouched. In current debates on victim participation, as could be seen previously, the retributive paradigm is even lauded to be the only feasible way to go for international criminal justice. Nevertheless, scholars have argued for a more holistic understanding of the functions and purposes of international criminal law given its deficiencies to fulfil the traditional purposes, the specificity of the crimes and the embeddedness in the transitional justice framework against the backdrop of which “the methodology by which perpetrators are punished, the theory of sentencing and the process of determining guilt each remain disappointingly ordinary” and the “quest for simplicity and legitimacy squeezes out the complexity and dissensus central to any process of justice and reconciliation.” (Drumbl 2003, 2, 6)

In order to fill the gap, left by classical modern state theories on punishment, rationales from transitional justice approaches are transferred to legitimize international criminal courts as one means in the re-storage of peace and justice in post-conflict societies. Victims play a crucial role in this context.

1.3. The transional justice “limb” filling the gap

“It would seem that the logic of punitive justice is not enough to legitimate the political and material investments of states in the field of international criminal

¹⁰¹ Osiel (2005, p. 1756), this gap is observed by many others, among which, McEvoy (2007).

¹⁰² Drumbl (2005, p. 550); similarly Brants (2007), focussing on the problematic of victor’s justice and the political implications on the formation of a collective memory.

law, requiring a humanitarian supplement to the objectives of the institutions such as the ICC.” (Kendall 2015, p. 375)

Given the observed gap in legitimization, or the inapplicability of traditional criminal legal theories and the embeddedness of international courts in a transitional justice setting, broader goals of international criminal justice, are considered (Ambos 2013b, p. 72). Consistent with the mandate of the ad-hoc tribunals, such additional goals are the restoration and maintenance of peace in the respective conflict zones. This conception of law introduces a strong causality between peace and justice in post-conflict societies. According to this conception, justice is the precondition – an almost *conditio sine qua non* – for the establishment of a peaceful coexistence. In the words of former prosecutor at Nuremberg: “There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.” (Benjamin B. Ferencz, cited in Gordon 1995, p. 218) This marks a decisive turn in the conception of post-conflict politics, especially against the background of the transitional justice processes in Latin and South America and Spain, where amnesties were the path chosen to achieve relative stability and peace.

“In this rapidly changing political context, the expanded humanitarian legal regime reflects the reframing of the meaning of security and the rule of law in global politics. The turn to international law enforcement through punishment is connected to a number of political projects associated with the present moment, involving aims from punishment to peacemaking.” (Teitel 2011, p. 86)

According to this legalist understanding¹⁰³ of international criminal justice and transitional justice, law plays a central role in social repair. Accordingly, securing peace by strengthening the rule of law and contributing to reconciliation by providing a historical record aimed at drawing a clear line between the past and the present to facilitate healing, are aims to be pursued.¹⁰⁴ Within this rationale, the truth-finding function of the courts, with its authoritative verdict, should clearly establish responsibility for the past wrongs and lay a foundation for a profound societal engagement with the past, preventing revisionist tendencies. In this context, it is alleged that the search for truth, not retribution or punishment is the most

¹⁰³ Vinjamuri and Snyder (2004), Vinjamuri and Snyder distinguish between legalist, pragmatist and emotional psychology approaches to transitional justice.

¹⁰⁴ Donat-Cattin (2001, 2008, 3); Luban (2008, p. 8). Luban emphasises that these are goals of trials and not the punishment.

significant goal of the ICC proceedings. (Donat-Cattin 2001) The individualization of guilt through criminal trials should, beyond deterrence, also serve a broader societal purpose, namely helping the community or society to move on by removing accusations of collective guilt which threaten to continually divide societies. (Werle and Burghardt 2012) Thereby, trials further channel the desires for revenge and help to prevent the alternative spiral of violence (Minow 1998; Bass 2000).

These rationales are legally fixed in the Right to Truth and the Right to Justice. The root of the victim's Right to Truth and Justice goes back as far as 1985, with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (in the following referred to as the Declaration).¹⁰⁵ The main instruments that played a part in the introduction of victim participation into the Rome Statute and constituted its basis were said Declaration and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (henceforth referred to as the Guidelines).¹⁰⁶

The ICC repeatedly refers to this right in its decisions on victim participation.¹⁰⁷ As elaborated above, the central provision (article 68 (3) of the Rome Statute) of the victim participation framework at the ICC is a blueprint of article 6 of the Declaration. Special Rapporteur Louis Joinet worked out a set of principles¹⁰⁸ defining the material scope of these abstract rights. His elaborations demonstrate the interrelatedness of transitional justice narratives, connecting the societal re-storation with individual re-covery and vice versa with the rationale of the right to truth and justice. He distinguished between a victim's right to know (Part I), to justice (Part II) and to reparations (Part III). The right to know does not only include an individual

¹⁰⁵ UN Doc. A/RES/40/34 (1985).

¹⁰⁶ UN Doc. A/RES/60/147 (2006), Annex. ; ICC-ASP, Court's Revised strategy in relation to victims (5 November 2012), http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf. Accessed 30 October 2014, para 6.

¹⁰⁷ Trial Chamber III, Prosecutor v. Jean-Pierre Bemba-Gombo, Fourth Decision on Victim Participation, 12 December 2008, ICC-01/05-01/08-320, para 88; La Chambre Préliminaire I, Situation en République Démocratique du Congo, Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, 17 janvier 2006, ICC-01/04-101, para 50.

¹⁰⁸ Commission on Human Rights, Questions of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), 1997, Final Report prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119 UN Doc. E/CN.4/Sub.2/1997/20, Annex II, Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.

dimension to know the truth about what had happened to the victim and his or her family, but it went further by understanding it to be a collective right of the society “drawing upon history to prevent violations from recurring in the future.”¹⁰⁹ The right to justice, according to the Set of Principles, comprised a right to a fair and effective remedy in the form of trials and reparations, including investigation into the crime, prosecution and if found guilty, the punishment of the perpetrator. Again, this was put into the broader context of securing a stable peace based on the assumption that without a response to the need for justice there can be no reconciliation.¹¹⁰

Fletcher and Weinstein differentiate five aims and the respective assumptions in transitional justice, wherein the relation of truth – justice and victims, implied in the material scope of the right to truth and justice, is illustrated. Firstly, discovering and publicizing the truth, which consists of a new authoritative and impartial record that could serve as a basis for a new national consensus is contended to be an aim of transitional justice. With regard to victims, it is alleged that knowing the truth has a potential healing effect, because it frees the victims from being trapped in the past. Again, a similar effect is inferred on the societal level – by knowing the truth about past atrocities, the society as a whole can finally move on (Fletcher and Weinstein 2002, p. 586). The link between truth – victims and the law is drawn by declaring that the “most authoritative rendering of the truth is possible only as a result of judicial inquiry” (Orentlicher 1991, p. 2546). The special authority, and with it legitimacy, of legal truth is said to lie in the widespread acceptance of its objectivity and the related impartiality (Fletcher and Weinstein 2002, p. 587; McEvoy 2007, p. 417). This is in accordance with the image of the criminal legal proceedings that was carved out in the previous chapter and its self representation as being the Other of politics. The second aim and assumption within the transitional justice framework is accountability, which is according to the legalist approach equated with prosecution and punishment as a necessary precondition for a peaceful coexistence (Bassiouni 1996). The rationale is, that only by showing serious efforts to bring to book the perpetrators of past atrocities, the newly established state apparatus can distance

¹⁰⁹ Commission on Human Rights, Questions of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), 1997, Final Report prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119 UN Doc. E/CN.4/Sub.2/1997/20, Annex II, Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity., para 17; For a more recent analysis of these two dimensions: Brunner and Stahl (2016).

¹¹⁰ Ibid., para 26.

itself from its predecessor and trustworthy state structures are thereby validated. Furthermore, the state by showing a moral and ethical response, acknowledges the suffering of victims which is thereby alleviated, or compensated (Fletcher and Weinstein 2002, p. 590). Thirdly, and related to the second point,

“trials are effective symbols because a legitimate legal judicial process is the antithesis of violence. Through a judicial process, a new regime is understood to re-establish the orderly function of the civil state and so to triumph over those who had deployed state power violently to achieve their own ends bringing about the destruction of civilians and subverting state institutions.” (Ibid., p. 596)

That way, trials serve to clearly demarcate the violent past from a peaceful future. With regard to the alleged connection to reconciliation, trials are promoted as means to encourage societies to address their painful past in order to “come to terms with it”, to achieve a sense of closure which is often compared to the therapeutic notion of healing and closure after traumatic experiences. (Ibid.) And, very generally, trials are also described to be responsive to victims’ needs of truth, acknowledgement, justice and healing (Ibid., pp. 592–595).

Some expressly discuss the purpose of “dealing with the past” or transitional justice as a distinct aim of international criminal justice (Stehle 2007, p. 45). Others discuss it within the realm of expressivism (Osiel 1997), and/or restorative justice (Burkhard 2010). In the rationalization of these general assumptions on the potential socio-political effect of international criminal proceedings in the affected societies, victims play a crucial role. They are called upon to legitimize international criminal law locally, nationally and internationally. And whereas the existence of a special victim-related purpose of punishment is controversial within doctrine, it is not contested that “justice for victims” is a means of accomplishing local and national reconciliation and has at least a symbolic value for the courts. Already the ad hoc tribunals, but still more recently the ICC, repeatedly emphasise their responsibility for “bringing justice to victims”.¹¹¹ Emphasizing that by providing local ownership over the criminal process, the gap between the Court and the affected communities can be bridged and this will contribute to more confidence into the system, not only

¹¹¹ ICCs revised strategy in relation to victims, (5. November 2012); Donat-Cattin (2001), Zappalà (2005).

the international criminal justice system, but also the local judicial systems.¹¹² The Court submits to be committed to a rights-based perspective that confirms and empowers the victim “as a vital actor in the justice process rather than a passive recipient” whose participation in the proceedings should “contribute to closing the impunity gap and is one step in the process of healing for individuals and societies.”¹¹³ Along the same lines, NGOs propagate that being involved in the redress mechanisms of the crimes they suffered from enables the restoration of their dignity which is the “ultimate objective in the provision of redress.”¹¹⁴ This narrative is tightly related to the legitimization of victim participation and its alleged function within the legal framework of the ICC. The victim’s rights to truth and justice, developed in human rights law are referred to when elaborating on the positive effect trials can have on individuals and the respective societies. Correspondingly, the said right to truth and justice have, according to reports elaborating on their material scope, a collective and an individual dimension and victim participation is one mean to achieve the presumed positive effects in post-conflict societies.

These narratives of truth and justice for victims and healing through participation are often uncritically reproduced abstractly and are implicitly reproduced in the grand narratives of international criminal justice.

2. Legitimizing International Criminal Law: A matter of faith?

All theories referred to when legitimizing international criminal justice have gaps and victims play an important role filling these gaps. Coming back full circle, the development narrated as a success story of international criminal law in general, and victims’ role therein in concrete, is not that linear. Analysing the theoretical level of legitimization and the empirical level of implementation and the reciprocal effects,

¹¹² The Importance of Victim Participation, Submissions to The Hague Working Group of the Assembly of State Parties, Victims’ Rights Working Group, 2013, http://www.vrwg.org/VRWG_DOC/2013_July_VRWG_HWG_ParticipationFINALrevised.pdf.

¹¹³ ICC-ASP, Court’s Revised strategy in relation to victims (5 November 2012), http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf. Accessed 30 October 2014, paras 6, 10.

¹¹⁴ The Importance of Victim Participation, Submissions to The Hague Working Group of the Assembly of State Parties, Victims’ Rights Working Group, 2013, p. 1, referring to CAT, General Comment No. 3: Implementation of article 14 by States parties, 2012, UN Doc. CAT/C/GC/3, para 4 “The Committee emphasizes the importance of victim participation in the redress process, and that the restoration of the dignity of the victim is the ultimate objective in the provision of redress.” http://www.vrwg.org/VRWG_DOC/2013_July_VRWG_HWG_ParticipationFINALrevised.pdf.

interruptions can be traced. Chronologically, the theorization of international criminal law, as well as the narratives framing victim involvement seem to go from undertheorized enthusiasm and taken for granted effects in the very beginning of international criminal justice, to a disenchantment caused by first experiences with international criminal courts and criticism pertaining to the legitimizing narratives based on more theoretical, but overall on empirical findings. One of the lessons learnt from this disenchantment in the effort to close the gap between expectations and realities was that victims' interests should be considered somehow in the criminal legal process. Due to the parallel developments in human rights law, victims were called upon in the legitimizing narratives and consequently calls for more participation grew louder. Building on TJ terminology, the narratives of truth and justice and healing through participation were referred to, abstractly. Since the grade of involvement increased, undertheorized enthusiasm in the narrative framing of victims and international justice and the possible improvement in legitimacy prevailed. And like before with international criminal law in general, it was the empirical analysis and experiences with the concrete implementation of the once so celebrated legal frameworks of victim participation at the ECCC and the ICC that debunked the noble theoretical goals. What appears to interrupt the linear plot of success of international criminal law in its search for justice in general, and justice for victims in particular, as a virtue and a tangible product, is the confrontation of the self-legitimizing practices and narratives with the actual situation and with the actual victims. The latest solution to bridge the gap, returning to the alleged retributive origins of international criminal justice, on the one hand misread Nuremberg as a purely retributive enterprise and on the other hand does not seem to seriously consider the theoretical implication of retribution and the respective criticism. If one took the demand to get rid of the "collective peace and security limb" and instead to rely on the classical function of a criminal tribunal – bringing the responsible to book (Ambos 2013a, p. 294 citing ; Damaska 2008) – seriously, the slogan "bringing war criminals to justice – bringing justice to victims" would read: "bringing some war criminal to justice, in some cases." This is probably not the most convincing legitimization, and it is definitely not compatible with the image of an impartial, rational, unpolitical court consistently painted in rich colors within the narrative of international criminal law. Nevertheless, the new slogan of the ICC illustrates a turn,

scaling down the general expectations vis á vis the Court. It just reads: “Trying individuals for genocide, war crimes and crimes against humanity”¹¹⁵ Still, the ICC prominently stages the citation of former United Nations Secretary General Kofi Annan: “This cause...is the cause of all humanity.”¹¹⁶ And, in accordance with the transitional justice vocabulary it is held that:

“Justice is a key prerequisite for lasting peace. International justice can contribute to long-term peace, stability and equitable development in post-conflict societies. These elements are foundational for building a future free of violence.”¹¹⁷

Thus, the doubtful legitimations were, and are called upon, to justify international criminal law and punishment. Given the gaps in classical theories legitimizing international criminal justice, an alternative left to bridge the gap is to believe in a universal cosmopolitan world order based on a Kantian eternal peace framework, which is created and reinforced through international criminal law and therefore legitimately always remains to come.

“In a disenchanted modern universe desperately seeking an unimpeachable moral core, the ICC has, for some, come to embody the transcendent and sacred. And helped to forge a new global self-conception founded on justice by means of a radical application of the rule of law.” And while it is to be supported that there is this moral court given the architecture of international affairs before, “the antiseptic strictures and internal finality of the legal process make it a particular tempting instrument for creating a false sense of closure within a self-absorbed utopia” (Akhavan 2003, p. 721)

Indeed, the practice of international criminal law has often been described as a religious exercise, relying on the faith of lawyers in the ability of law to transform, or even replace politics: “lawyers tend to share the faith that law is “the instrumentality of justice, as man’s highest achievement in his reaching after righteousness.” (Koller 2008, p. 1050) More critical approaches disclose the simplifying and reassuring effect this has:

“International criminal law carries this kind of a religious exercise of hope that is stronger than the desire to face everyday life. Focusing on the idea of international criminal justice helps us to forget that an overwhelming majority of the crucial problems of the societies concerned are not adequately addressed by criminal law. The ideology of a disciplined, mathematical structure of

¹¹⁵ <https://www.icc-cpi.int/>, last accessed 25/5/2016.

¹¹⁶ <https://www.icc-cpi.int/about>, last accessed 25/5/2016.

¹¹⁷ <https://www.icc-cpi.int/about>, last accessed 25/5/2016.

international criminal responsibility serves as a soothing strategy to measure the immeasurable. The seemingly unambiguous notions of innocence and guilt create consoling patterns of causality in the chaos of intertwined problems of social, political and economic deprivation surrounding the violence. Thereby international criminal law seems to make comprehensible the incomprehensible.” (Tallgren 2002, pp. 593–594)¹¹⁸

More recently scholars analyze which constituencies are called upon by the ICC and thereby produce the field of “symbolic economy” of international criminal law rather than asserting any theoretical or empirical constituency per se (Mégret 2015).¹¹⁹ The conclusion of these approaches is more sobering, namely that the fact that diverging, sometimes conflicting constituencies are invoked suggests that the ICC’s main constituency might in fact be “nothing but itself” (Ibid., p. 45). More critical approaches contend that there are general limits inherent to courts as means to achieve post-conflict justice and international criminal justice is therefore either critically, or uncritically thought to be a matter of shared faith and to a certain extent immune to empirical consequences (Nouwen 2012, p. 344; Drumbl 2011). Consequently, “when confronted with contrary empirical evidence, true believers continue to believe and doubters are advised to believe harder.” (Nouwen 2012, p. 344) Following this criticism it is claimed that until now, effectiveness based critique dominated over assumption based critique, the former is mainly aimed at strengthening the existing structures (Schwöbel 2014, p. 3).

3. Conclusion

To conclude, truth and justice for victims and healing through participation are two of many arguments for the necessity of legal proceedings in the aftermath of massive human rights violations, and they fill a gap, left by the application of classical criminal legal theories in international criminal law. International criminal law seems to fail to fulfil promises leaving the impression that there is a *justice-gap*, a discrepancy between claim and reality which haunts international criminal proceedings and which, I claim, cannot be bridged by progressively improving the structures and thereby confirming them generally. Accordingly, in the next chapter I will discuss this justice-

¹¹⁸ Nouwen (2012) diagnoses international criminal lawyers with cognitive dissonance and faith one coping mechanism beside denial and blame shifting.

¹¹⁹ With a critical focus on victims: Kendall and Nouwen (2013); Fletcher (2015).

gap from a theoretical perspective that refrains from providing answers within the flawed discussions on the restorative-retributive framework of criminal law. In my deconstructivist reading of the legitimizing narrative of criminal law – truth and justice – international legal proceedings are analysed to always already be in need of the strict distinction between politics and law; emotions and rationality; subjectivity and objectivity; facts and values to reach a fictive closure. This reading will be combined with a psychoanalytical and trauma theoretical discussion of the question raised by Tallgren:

“[...] whether criminal law could ever be able to provide closure to large-scale, deep-rooted injustice and suffering, and whether the expectation of finality after a criminal trial has established the truth by identifying the guilty could in fact violently silence other truths, other kinds of responsibilities. Perhaps there is a pain which has no closure.” (Tallgren 2002, p. 593)

Chapter 3: Taking the gaps seriously

1. The justice gap

In the first part I showed that within the ‘success story’ of international criminal law and victims:

Firstly, discussions on victims in international criminal law are closely related to debates about legitimacy of international criminal courts in general, and that;

Secondly the image of the victim is constructed and inter-related with the construction of the ideal of international criminal law – the victim is described as irrational, emotional, unpredictable, partial, political, subjective; whereas international criminal courts are portrayed to be rational, sober, predictable, impartial, unpolitical and objective.

Thirdly, when zooming into discussions about victim participation at the respective courts, these diverging conceptualizations lead to tensions. The suggested reforms to dissolve the tensions that arose in the confrontation of actual victims and international criminal courts are lead under the heading of restorative vs. retributive justice. At the courts, measures of externalization, representation and collectivization were applied to render victim participation more effective.

Since the recent debates concerning the ICC are flanked by theoretical discussions that dichotomize retributive and restorative justice rationales, and the mainstream seems to suggest to return to the alleged retributive origins of international criminal law, in Chapter 2, I took a step back and looked at the legitimacy of international criminal law in general. Given the initial discussions on the purposes of the proceedings at Nuremberg, and the related criticism of the alleged retributive focus, which is considered to be insufficient, legitimacy in general seems to be controversial in international criminal law. The conclusion when looking at legitimizing theories generally is that:

Firstly, discussions on the legitimacy of international criminal law are theoretically flawed and when being confronted with thorough theoretical scrutiny and/or

empirical analysis there is a gap between the noble goals and the not so noble reality, which I refer to as the *justice gap*, and that;

Secondly, victims play a crucial role in legitimizing international criminal law and thus are referred to, in order to fill the described gap. Victims are repeatedly referred to as the constituency in need of international criminal justice. The narratives rely on assumptions lent from transitional justice presuming that international criminal courts bring truth and justice to victims and that truth, justice and participation contributes to healing of individuals and societies.

Thirdly, the practice of international criminal law and its alleged effects are mainly based on uncritically taken for granted presumptions which by some is described as faith. This culminates in the claim that international criminal law contributes to the creation of a universal cosmopolitan world order based on a Kantian eternal peace framework which legitimately always remains to come and does therefore not depend on empirical verification.

This chapter addresses what I described as the *justice gap* in the previous chapters – the gap between theorization of international criminal law, the role of victims therein and the empirical disillusion about the assumed effects - from a critical legal perspective.

Through an eclectic perspective combining a variety of authors and theoretical concepts and contexts, the underlying narratives of victim participation will be deconstructed and thereby I hope to provide a different reading of victims' role at international criminal courts. This perspective then guides my empirical engagement with the practice of victim participation at the ICC.

Firstly, the inherent exclusionary epistemic violence in both narratives, truth and justice through law and healing through participation is step by step unearthed. A deconstructive reading of the gap in justification reveals that it is inherent in the legal claim to find the truth and bring justice and that the very reference to these ideals obscures the exclusionary violence of legal truth finding efforts. The narrative of healing through participation and the respective notion of the rational autonomous subject will be scrutinized from a psychoanalytical Lacanian perspective. On the basis of Lacan's notion of the split subject, trauma theoretical conceptions then reveal that

the peculiar cherishing of the idea to bring truth and justice to victims and to thereby contribute to the healing of the traumatized victim can be conceptualized as inherent in the strive to reach closure after traumatic events. However, given the specific structure of trauma, closure will never have been possible. Once understood as a shared fiction with a distinct purpose, the characterization of international criminal lawyers as believers and the bridging of the theoretical lack with faith is a precondition to preserve the fiction while the realization of the lack inherent in the legal endeavour to reach closure, seems to be unbearable within this symbolic order. The narratives of truth and justice for victims and healing through participation then are read as trauma narratives attempting to transmit, manage and contain the overwhelming experience of traumatic violence and finally re-integrate the victims into the symbolic order. However, like law's inherent aporia to find the truth and reach justice, the re-integration of traumatic events into the symbolic order is impossible and continuously communicates its inherent inadequacy which generates further narratives to reach the fictive closure of the traumatic lack.

Against this theoretical backdrop, secondly, the practices of excluding, representing and collectivizing victims are conceptualized as effects of the exclusionary epistemic violence inherent in the conceptualization of the victim in the narratives that frame the relation between international criminal courts and victims. The mutually constituting images – that of the rational, sober, impartial and objective criminal courts and that of the irrational, emotional, partial and subjective victim – can only be uphold by excluding, representing and collectivizing the actual victims.

Thirdly, in the context of this theoretical conceptions, one has to take into account the situatedness of the ICC within the global order to reveal the hierarchical structures within the representational practices. This adds a crucial dimension to understand the epistemic violence which can be traced in the language used and in the representational practices of „*African victim*“s at The Hague. It is the „*African victim*“ that is portrayed as the emotional, irrational representative of the lack which has to be closed by the rational Western-style criminal court. In the narrative framing, truth and justice are delivered to those who are incapable of finding it by

themselves. Based on Spivak's text *Righting Wrongs* (Spivak 2004) the slogan of the ICC could be: *We right your wrongs for you!*

On a more abstract level, the „African victim“ and African countries serve to produce an image of trauma and violence which re-produces the image of a rational non-violent version of Western rule of law, which, if implemented world-wide, can provide peace and security for all. The ideal cosmopolitan international legal order is represented as the trustworthy, peaceful global order to strive for, the symbolic order into which victims need to be re-integrated. At the same time the inherent injustices of this order and the interrelated exclusionary violence vis á vis the African subjects are obscured.

Finally, I will shortly elaborate on what I call the *beyonds of justice*, the theoretical reflections on the possibility of ethics beyond a fixed understanding of truth and justice. Against this background, I suggest to make use of law's inherent (im)possibilities and its relation to its emotional others and to continuously reflect the post-colonial dimension of the representational practices to be more attentive to the ethics of listening developed in trauma theory.

2. Truth and Justice through law?

The possibility of truth and justice is a genuine philosophical/ethical/moral discussion and it seems peculiar that this is hardly ever addressed when raising the truth to the level of a right that can be enforced through law.¹²⁰ Or, in the words of Damaska:

“[...] the gap seems to be widening between the views on truth prevailing in a variety of theoretical disciplines and the understanding of truth in the social practice of adjudication. One of the working assumptions of the practice of adjudication is that truth is in principle discoverable, and that accuracy in fact-finding constitutes a precondition for a just decision.” (Damaska 1998, p. 289)

This *working assumption of legal adjudication* is the basis of the right to truth and will be theoretically scrutinized in this chapter. Through a deconstructive reading I hope to step by step work out a different perspective on the conceptions of truth, law, justice and consequently on the victim subject within these proceedings.

¹²⁰ See previous Chapter 2.

But let us start with the working assumption of legal adjudication and see if the description is not downplaying the role of the affirmation of truth for law and justice, especially in criminal law, since according to the classical criminal legal understanding:

“Knowing exactly what has happened, who the culprit is, and why he committed the offense, is a necessary prerequisite for any attempt to re-establish social peace through justice. The determination of the truth is indispensable for yet another reason – criminal sanctions are society’s most severe expression of moral blame. It is therefore imperative that criminal sanctions be imposed (only) upon those who are in fact guilty.” (Weigend 2003, p. 158)

For these reasons,

“[I]t seems obvious that adjudication cannot draw on this radical thought (post-modern, or post-structuralist theories A/N) for inspiration. When we engage in social practices such as adjudication, we presuppose a world beside our statements. And as factfinders, we embrace a vision of the world in which there is reality beyond language.” (Damaska 1998, p. 290)

These statements, exemplary for the discussion of the problematic of truth and law when being confronted with philosophical scrutiny, reveal how truth together with justice is not just any working assumption for the law, but probably *the* working assumption. Put differently, it is the assumption law works on. One of the foundations without which, this is admitted, adjudication – the law – would not be what it is now and what it has been. It is one of the legitimizing premises of law in general, and criminal law in particular. Interestingly, in the discussion, all theories that might radically call into question this basis – namely so called post-structural theories – are rejected as too radical, sceptic (Patterson 1992), relativist or just not constructive or helpful (Damaska 1998). The farthest the consents to post-modern questioning of truth as accessible and justice as achievable can go, is to affirm that legal truth is constructed following legal premises, that something is true in the eyes of the law (Balkin 2003). On this basis, the assumption is that the concrete legal truth produced through its conventions, norms, rules and application is a misrepresentation, distortion, of a truth before the law. Or, that legal truth conflicts with other forms of truth and other disciplines producing truths. According to this truth and knowledge are shaped by institutional purposes. Interestingly, the terminology then often shifts to the distinction between facts and legal truth. What before was

referred to as truth, now is facts transformed/translated into a legal truth in the legal proceedings. If we cannot rely on a truth before the law, we can rely on facts that can be uncovered and implemented into a legal emplotment – the legal truth.

After considering post-modern conceptions of truths, Naqvi, who appears generally more favourable to the theories, comes to the conclusion that truth is a social matter at the same time it can be verified or at least corroborated by evidence, it may consist of an official statement or judgement, it is the obligation to say that what happened indeed happened always relative to present needs and consequences (Naqvi 2006, pp. 253–254). Post-modern/post-structuralist¹²¹ thought is then summarized as seeing the most appropriate concept of truth as that version of facts acceptable to all concerned (Ibid., p. 272).

This generalization of very diverse theories is once again a sign for the undertheorization and the lack of critical and substantiated discussions concerning the foundations of international legal provisions like the right to truth and justice relied upon in the legitimizing narratives of international criminal justice. Reading the narrative of truth and justice for victims from their gaps entails that the theoretical discussion takes as its starting point those theories that seem to be precluded from the range of theories considered helpful to discuss the problematic of truth and justice as achievable through law. Despite the critique that these theories would render legal truth-finding efforts preposterous, I claim that they provide a lense through which the exclusionary violence inherent on the criminal legal practice become visible. Hence, the stakes for truth and justice are even raised, since the exclusionary violence of positing, entailed in referring to the truth and the justice, is not obscured and has to be considered. In the words of Derrida:

“This justice always addresses itself to singularity, to the singularity of the other, despite, or even because it pretends to universality. Consequently never to yield at this point, constantly to maintain a questioning of the origin, grounds and limits of our conceptual, theoretical or normative apparatus surrounding justice – this is, from the point of view of a rigorous deconstruction, anything but the neutralization of the interest of justice, an insensitivity toward justice. On the contrary, it hyperbolically raises the stakes in the demand for justice, the sensitivity to a kind of essential disproportion that must inscribe excess and inadequation in itself.” (Derrida 1990, p. 955)

¹²¹ Mostly used interchangeably, with the exception of Patterson (2003).

2.1. Truth, the Law and Justice

In his basic understandings, Derrida builds on Nietzsche's "[...] suspicion of the values of truth ('well applied convention'), of meaning and of being, of 'meaning of being, the attention to the economic phenomena of force and of difference of forces and so forth.'" (Derrida 1995, pp. 30–31)

For Derrida, Nietzsche provides an "entire thematics of active interpretations, which substitutes an incessant deciphering for the disclosure of truth as a presentation of the thing itself." (Ibid., p. 33) The "entire thematics of active interpretation" is the process of signification, which is the starting point for the development of the concept/strategy¹²² of deconstruction or deconstructionist reading. In this sense, signification is the quest for the proper word for the thing or thought – where in fact, there will never be a correspondence between thing/thought and word – there will never be an identity of signifier and signified. Accordingly, the thing beyond language is never accessible. Truth is always already represented within language. Language is understood as a system of signification within which the signifier can only be "defined" by its difference from its opposite.

"The structure of reference works and can go on working not because of the identity between these two so called component parts of the sign [signifier and signified A/N], but because of their relationship of difference. The sign marks a place of difference." (Ibid., p. 22)

The understanding of signification as a process of infinite referral without ever arriving at meaning per se lies at the heart of Derrida's understanding and his reading of texts and accordingly his relation to the truth. Contrary to Heidegger's understanding of a referral to a transcendental signified, Derrida admits that there is a desire for closure, but rejects such "metaphysical desires" to instead look for openings within language (Ibid., p. 29). Since this process of infinite referral of signifier and signified produces a surplus of the unrepresented, the unsaid and therefore leaves traces of the excluded, looking from within means, finding the traces, finding the present absence within a text, reject closure and exactly not strive

¹²² Describing deconstruction is as impossible and necessary in this context as describing and grasping truth, justice etc. Derrida himself rejects the labelling of deconstruction as a method, which would perhaps best fit within the scientific framework. Rather, because deconstruction is a questioning of the foundations of exactly these frames and therefore balks at being framed at all. Deconstruction happens – all texts are deconstructable. Deconstruction is used here as a form of reading, aware of the per se inappropriateness of this framing.

for identity. “The structure of the sign is determined by the trace or lack of that other which is forever absent. [...] the trace is the mark of the absence of a present, an always already absent present, of the lack at the origin that is the condition of thought and experience.” (Ibid., pp. 23–24) Like mentioned in the Introduction, there is no presence without absence, and no voice without silence. Deconstruction, accordingly reveals the excluded others, the traces of the surplus in the process of signification, it “dramatized the exclusions, brings them to an extreme” (Vismann 2005, p. 7).

Actually, Derrida claims that the problematic of justice lies at the very heart of most of his texts, since, and this is what he will come to in his elaboration on law and justice, he somewhat provocatively states that deconstruction is justice.

“It is a deconstructive interrogation that starts, as this one did, by destabilizing, complicating or bringing out the paradoxes of values like those of the proper and of property in all their registers, of the subject, and so of the responsible subject, the subject of law (*droit*), and the subject of morality, of the juridical or moral person, of intentionality, etc., and of all that follows from these, such a deconstructive line of questioning is through and through a problematization of law and justice. A problematization of the foundations of law, morality, and politics.” (Derrida 1990, p. 931)

Against the backdrop of the *justice gap* in international criminal law and the serious flaws in the theorization of its legitimacy, it may seem heretical to call into question the already thin foundations. But I claim that only by taking gaps seriously, by applying a deconstructionist reading of the legitimizing narratives one can reveal the inherent violence of a forgetful narrative, reflect one’s own gaps and take responsibility for law’s (im)possibilities and aporias. By finding the traces of the unrepresented in law one can open up spaces from within. In order to do so, I will start by introducing Derrida’s reading of the possibilities of justice through law in his text “Force of Law The “Mystical Foundation of Authority” which is the central deconstructionist text on the relation of law and justice (Ibid.).

Derrida starts by looking at the language of law discussing the wording “to enforce the law” in which he sees the remains of the *Ursprungsgewalt*.¹²³

¹²³ This term is from Benjamin’s Benjamin (2016), which Derrida refers to.

“The word “enforceability” reminds us that there is no such thing as law (*droit*) that does not imply in itself, a priori, in the analytic structure of its concept, the possibility of being “enforced”, applied by force.” (Ibid., p. 925)

But force does not necessarily mean violence, which, according to Derrida is always judged unjust. “Is there a just force, or a nonviolent force?” (Ibid., p. 927) To approach this distinction between justified and therefore nonviolent force of law and unjust violence, Walter Benjamin’s essay *Zur Kritik der Gewalt* (On the Critique of Violence) (Benjamin 2016), in which the latter denounced the *Ursprungsgewalt* of law permeating in law-positing and law-maintaining, is referenced. According to Benjamin, the two legal schools justifying legal force and therefore determine its nonviolence, positivism and natural law, both rely on the same circle of dogmatic presuppositions: positive law remains blind towards the unconditionality of ends; natural law to the conditionality of means (Derrida 1990, p. 983). Both neglect the founding violence which is perpetuated in the monopoly of violence, since the latter does not protect legal ends, but law itself, it is always also the so-called law preserving violence. In Derrida’s words:

“ A “successful” revolution, the “successful foundation of a State (...) will produce *après coup* what it was destined in advance to produce, namely, proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others the interpretative model in question, that is, the discourse of self-legitimation.”¹²⁴

Every foundation in this sense is a promise. Every positing of law permits and promises; it posits by setting and by promising. “And even if a promise is not kept in fact, iterability inscribes the promise as guard in the most irruptive instant of foundations. Thus it inscribes the possibility of repetition at the heart of the originary. ... Position is already iterability, a call for self-preserving repetition.” (Ibid., p. 997)

Accordingly, preserving and positing violence are intertwined, Derrida calls this differential contamination. The violence of foundation positing the law must contain preserving violence and cannot break with it, and the preserving violence always

¹²⁴ Derrida (1990, p. 993), Derrida refers in *Unabhängigkeitserklärungen* to this phenomenon of future anterior. Derrida (2000).

envelops positing violence since by re-iterating it always also alters – iteration is always also alteration.¹²⁵

“[T]he operation that amounts to founding, inaugurating, justifying law (*droit*), making law, would consist of a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just nor unjust and that no justice and no earlier law with its founding anterior moment could guarantee or contradict or invalidate.” (Ibid., pp. 942–943)

This origin of law’s authority, resting on nothing but itself, makes law and justice deconstructable, it calls for deconstruction, because this lack at the origin leaves traces. And all theories that do not conceive of this interrelatedness of violence and law, but instead seek to find justifications for the founding violence and establish ends legitimizing legal means, cover the traces of this violence with myths. They thereby contribute to the violence, they force closure (McCormick 2001). Derrida, in this critique expressly and in the following implicitly, refers to the Kantian idea of the categorical imperative, civil (human) rights and eternal peace as such justifications.

“As long as they do not give themselves the theoretical or philosophical means to think this co-implication of violence and law, the usual critiques remain naïve and ineffectual. [...] The reference to the categorical imperative (“Act in such a way that at all times you use humanity both in your person and in the person of all others as an end, and never merely as a means”, however uncontested it may be, allows no critique of violence. Law (*droit*) in its very violence claims to recognize and defend said.” (Derrida 1990, p. 1003)

Deconstruction instead aims at uncovering the aporias located between law and justice, in the calculation of the incalculable. Justice as law claims legitimacy or legality, law is a stabilizable, statutory and calculable (dispositive), a system of regulated and coded prescriptions, whereas justice is infinitive, incalculable, rebellious to rule and foreign to symmetry, heterogenous and heterotropic (Ibid., p. 947). Since law claims to exercise in the name of justice, the problematic lies in between the two, the problematic lies in law’s invocation of justice.

“Instead of just one can say legal or legitimate, in conformity with a state of law, with rules and conventions that authorize calculation, but whose founding origin only defers the problem of justice. For in the founding of law, or in its institution, the same problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed.” (Ibid., p. 963)

From this, Derrida develops three aporias of law:

¹²⁵ Derrida calls this iteration, or iterability.

The first is the *fresh judgement*: Every legal decision is based on a law/rule/article but has to be taken without it. That is to say, the decision has to maintain the basis while at the same time substantiate and thereby destroy its abstract character.¹²⁶ In every decision the question arises: is this just? And in the next instance it is decided and thus buried again – leaving something undecided. Justice and violence are hence entailed in every *fresh judgement*.

The second is the *haunting of the undecidable*. Building on the conception of traces, decisions, or fresh judgements, bear traces of the undecided, of the buried justice. The ghosts of undecidability are haunting every decision that would not be a decision, if it were not undecidable. “The undecidable remains caught, lodged, at least as a ghost - but an essential ghost - in every decision. Its ghostliness deconstructs from within any assurance of presence, any certitude, or any supposed criteriology that would assure us of the justice of a decision, in truth of the very event of a decision.” (Ibid., p. 965) Like *différance* defers signification, the ghosts of undecidability defer justice, which remains to come.

And the third aporia is *urgency obstructing the horizon of knowledge* (Ibid., p. 967): A just decision cannot wait for infinitive knowledge, it must be taken immediately. “It cannot provide itself with the infinite information and the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it.” (Ibid.) And since it is always also a new foundation, a reinstitution of the knowledge and rules it relies on, even if a decision could rely on unlimited knowledge, it would at the same time “mark[s] the interruption of the juridico-, ethico-, or politico-cognitive deliberation that precedes it” (Ibid.).

In conclusion, the legal concept of justice is intertwined with its justice burying violence and finally serves to mask and obscure it. Derrida rejects to embrace any idea of a regulative idea of justice in the Kantian sense, he rejects to anticipate any horizon for justice to make a promise of justice for the future, because, “[A]s its Greek name suggests, a horizon is both the opening and the limit that defines an infinite progress or a period of waiting.” (Ibid.) The justice to come, *à venir, im Kommen*, Derrida has in mind, does not have a horizon of expectation, since it is no

¹²⁶ This is a similar problematic, that was described previously and is called iterability by Derrida. See fn. 125.

future in the temporal sense which would close the horizon again and thereby promise impossible closure. Justice is the excess over calculation, rules, programs, anticipations, it is the overflowing of the performative, it is the traces of the absent present (Ibid., 969, 971). “Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l’avenir* the transformation, the recasting or reforming of law and politics.” (Ibid., pp. 970–971)

Reading legal practice based on this deconstructivist notion of justice implies to take the gaps seriously, to take into consideration the excess of signification, to carve out the traces inherent in every legal decision, to be sensitive to ghosts. These traces endlessly defer the promised closure of the legal system (Douzinas 1991, p. 142). Like *différance* defers the process of signification, and the sign is marked by the memory of the trace of the unrepresented, the legal process of signification is deferred by the excess of the (just) decision.

As described in the previous chapter, more recently, theorists ask whether the constituency of the ICC rests on “nothing but itself” (Mégret 2015, p. 45). This legal authority resting *on nothing but itself* is exactly what renders international criminal law deconstructable. The justice gap in international criminal law, not only vis à vis victims, can be interpreted against this backdrop as traces of the aporias of law and justice. This ghostly gap is haunting the legitimizing narratives that reach for closure and finality and invoke a concept of justice that is not reflective of its inherent violence but tries to justify it. The narratives of justice in international criminal law are impelled by the traces of its impossibilities that are in turn attempted to be closed again by new legitimizing arguments that are deemed to fail, since justice always exceeds law. Closing the gaps, taking decisions, claiming justice implies exclusionary violence which permeates law in its ghostly appearance.

3. The lacking subject – trauma and violence

In the previous section I outlined the deconstructivist critique of the interrelationship between truth, the law and justice. The focus of this section, in which I discuss psychoanalytical concepts of the subject, will be the progression from a violent past, through law as present into a peaceful future and the

transformation/empowerment of the victim object, through legal participation into a subject. I will proceed by scrutinizing the underlying subject-position - namely the Cartesian idea of an autonomous cogito – with the help of a Lacanian notion of a split subject build around a lack. To subsequently address the scattering effect of traumatic events on the Cartesian subject- position and the function of the narrative of healing, restoring and re-integration of the subject into a symbolic order. By introducing a cultural conceptualization of trauma that is based on the notion of the Lacanian subject position, the law's function within these narratives is scrutinized. Finally, I will discuss the consequences of this psychoanalytical – cultural – understanding of trauma, the subject and law and its implications for international criminal law within transitional justice and the healing through participation narrative.

3.1. Lacan and the subject

Building on the assumption that the unified autonomous subject is as fictive as the notion of accessible truth, and that the quest for identity might be located in the unconscious, Lacan introduces a respective notion of the subject reflecting the always already lacking subject and the (im)possibility to access truth beyond language¹²⁷. Opposing the so called I-psychology, or ego-psychology, building on the common Cartesian notion of the subject which is at the same time the basis for the mythology of presence – of the truth, critiqued by Derrida, Lacan in his psychoanalytical approach conceives the subject to be split and decentred and remarks that “this experience sets us at odds with any philosophy directly stemming from cogito.” (Lacan 2005, p. 75) Furthermore, in his involvement with Freudian thought, Lacan combines psychoanalytical assumptions with structuralist linguistic theories, emphasizing the crucial role language plays, not only structuring the social order, but as well in the interrelated structuration of the unconscious and consequently in subjectivization. Thereby, he reveals the continuous intertwinement of subjective and social reality through language. In the context of this analysis and in relation to Derrida's critique, Lacan's conception of the subject is crucial for the

¹²⁷ I will not address the discussion if Lacan's notion can still be called subject, or if it is not rather the human, since subject does always imply some idea of identity. I consider this discussion unnecessary in the context of this work, since the healing through participation narrative of transitional justice and international criminal law refers to the subject and its re-paration etc., it would be rather confusing to introduce a different term as I want to suggest a different conception.

understanding of the search for truth and justice and the embeddedness of the subject within the social, and politico-juridical field. Whereas Derrida cursory touches upon the problematic of the subject throughout his texts, Lacan focussed on it and problematizes, what Derrida does on a textual level, namely the striving for closure (Zichy 2006, p. 99). Especially against the backdrop of traumatic experiences, the decentralized conception of the subject is crucial to understand the political dimension of the claim to re-store the subject position of victims with legal means and to thereby re-integrate subjects into the symbolic order of post-conflict societies propagated according to a legalist approach to transitional justice.¹²⁸ Given that a certain conception of the unified subject is the basis for our understanding of the functioning of the world, the questioning of this conception, just like Derrida's revealing of the aporias between law and justice, radically calls into question our conceptions of law, the state, and the global order. It reveals the aporias, the (im)possibilities of identity and closure with regard to the subject and thereby reveals the exclusionary violence entailed in the pursuit of healing and closure.

“Contrary to the notions of the ego as “centered on the perception-consciousness system or as organized by the “reality principle” – the expression of a scientific bias most hostile to the dialectics of knowledge...” rather “takes as our point of departure the function of misrecognition that characterized the ego in all the defensive structures...” (Lacan 2005, p. 80)

The starting point for the conception of the split subject, build around a lack is what Lacan calls the mirror stage. In this early stage the infant first recognizes itself in a mirror and mistakenly conceives of the image in the mirror as the self-identical I which is actually always already represented in an image and only reflected.

“This moment at which the mirror stage comes to an end inaugurates, through identification with the imago of one's semblable [...] the dialectic that will henceforth link the I to socially elaborated situations.” (Ibid., p. 79)

Following from this, there cannot be any direct, unrepresented conception of the I, since we never get an unrepresented glimpse at ourselves, we are always looking for reflections of the self in the eyes of the other.

“‘The Mirror-Stage’ development of the ego...our precious identity is imaginary (that is, arising from our fascination with and captivation by the image in the mirror) but also antagonistic: it arises from the subject's first desire to be

¹²⁸ See previous Chapter, Part I Chapter 2.

recognized by the other. Which is deemed to fail. [...] The subject cannot attain self-consciousness from witnessing her own mirror image, from what her eye can see, because the mirror image is literally an image: a mirage and therefore an imaginary.” (Aristodemou 2014, p. 82)

In the mirror the subject appears to be whole, complete, separate and individual, when in fact it is only a representation which is subsequently aspired in the eyes of the other (Edkins 2006, p. 103). Accordingly this imaginary wholeness is strived for when entering into the symbolic order – the social order. Lacan differentiates between the symbolic order, the imaginary order and the Real. The symbolic order is structured by language which is itself, as we could see in the previous part, centred around a lack, or excess of signification.¹²⁹ Just like Derrida, Lacan¹³⁰ sees in language and the process of signification within the symbolic order an enabling and disabling factor. This lack at the centre of the subject on the one hand always represents the failure of representation and on the other hand is the driving force of representation. The lack “... creates a void and thereby introduces the possibility of filling it. Emptiness and fullness are introduced into a world that by itself knows not of them.” (Aristodemou 2014, p. 34 citing ; Lacan 1996) “The lack is both, what keeps us going as well as what perennially troubles and tortures us.” (Aristodemou 2014, p. 34) On the one hand, language is responsible for inflicting the lack on the subject, the “gap that forever separates the domain of (symbolically mediated, i.e. ontologically constituted) reality from the elusive and spectral real” (Žižek 2000, p. 57). Being lacking, the subject strives for fullness and attempts to fill the lack, fantasising closure.

“[w]hat psychoanalysis calls ‘fantasy’ is the endeavour to close this gap by (mis)perceiving the pre-ontological Real as simply another ‘more fundamental level’, level of reality – fantasy projects on to the pre-ontological Real the form of constituted reality ...” (Ibid.)

The subject striving for wholeness, aspiring the identity of an I, is located in the imaginary order and therefore is deemed to fail. The lack is introduced through language and the subject that is inevitably precipitating towards the signifier, once the word is pronounced, realizes that it never really fits – there is always an excess or a

¹²⁹ Here, Lacan, just like Derrida relates to Saussure’s and Levi-Strauss.

¹³⁰ One must say, just like Lacan, Derrida sees... because Lacan was the first and both relied on Claude Lévy-Strauss structuration theory.

lack – there never will have been identity, and there never will be, since the lack is at the centre of the subject itself. (Ibid., p. 58)¹³¹

Žižek conceptualizes this *not all* and/or *too much* in the process of signification within the symbolic order as the immanence of the Real in the Symbolic. The encounter with this immanent Real is the encounter with the lack – with the aporias, using Derrida's conception. Lacan then introduces the German Legal terminology to illustrate the repeated failure of the subject to reach closure, to fill the lack. He introduces a triad, the already mentioned Symbolic, the Real and the Imaginary. Then he distinguishes between the Ding (the Thing) and the Sache, used within German legal terminology according to which the Thing is located in the order of the Real, it is beyond language, and therefore inaccessible, whereas the Sache is the representation of the Ding in the symbolic order (Vismann 2011, p. 20). But, just like signified and signifier, Ding and Sache never correspond, the Real is inaccessible, there will never be identity between the two.¹³² From this Vismann derives that at court, the unspeakable Thing/Ding is transformed/translated into the speakable Sache which, given the impossibility of identity, will again leave traces of the unsaid and unrepresented, because the object is always already lost when we assume subject position within the symbolic order. "*C'est de sa nature que l'objet est perdue comme tel. Il ne sera jamais retrouvé.*" (Lacan 1996, p. 65)

Just like the process of signification is endlessly deferred, leaving traces of the unsaid and unrepresented, the subject is haunted by the lack and excess of reaching for fullness and closure of identity. So, the subject like the social order – the symbolic – is radically incomplete with a lack at its centre (Edkins 2006, p. 104). Accordingly, all conceptions of an autonomous, self-conscious subject that are central to our conception of law and the modern state are fantasies of a complete, contained social order that we construct to heal the lack. "If the object is always lost and the subject is always a loser, then what we put in place of the lacking subject is the fantasy object that will heal the lack." (Aristodemou 2014, p. 154)

¹³¹ Contrary to Freud, the *castration* of the subject according to Lacan appears when *entering* language it is the always already lost *real*.

¹³² This is why Lacan uses the German terminology that distinguishes between *Ding* and *Sache*, whereas the French translation would be *la chose* for both. Vismann (2011),

Lacan calls the fantasy objects the master signifier concealing the lack, this could be god, the nation, justice etc. The master signifier conceals the lack and obscures the exclusive violence inherent to reaching closure – the violence vis á vis the other in the process of signification.

“The social order is held together by the ‘master signifier’, which quilts the sliding signifiers and makes sense of the whole social field. In the past ‘God’ has fulfilled this role, or ‘science’. The ‘nation’ has a similar symbolic function. A narrative comes into being that can explain everything, and that gives no space for the lack: the social field is totalized and made to appear impregnable.” (Edkins 2006, p. 104)

This is a radically different conception of the subject than the subject underlying the narratives of truth and justice for victims and the possibility of healing. The understanding of the unconscious as structured by language which brings about the inevitable intertwinement with the social order – its embeddedness in the symbolic order – provides an alternative understanding of the function of the notions of truth and justice for victims as something tangible, constructed in the narratives surrounding victim participation at the ICC as a fantasy. It can be perceived as a fantasy that is totalizing the field of international criminal law and transitional justice. When international criminal lawyers are described to be believers, who, facing the gaps in legitimization, construct an all good things go together logic (Zolkos 2015, p. 164) and urge all doubters to believe harder (Nouwen 2012, p. 344), this is representative of the fantasy function of international criminal law. “Our legal rules are by implication just as many fictional constructs whose existence as well as efficacy depend on the degree to which we believe in and subscribe to them.” (Aristodemou 2014, p. 192) It is important that we believe in the justification of the legal violence after the fact, that we believe that it was no violence and it will never have been.

This fiction of a basically non-violent closed symbolic order is scattered by the individual and collective experiences of violence, we call traumatic violence suffered from by the victims of the crimes tried at The Hague. The narrative of a functioning, closed global order, relying on separate modern states, that are based on the rule of law and constituted through autonomous citizen subjects, that allegedly stands for peace, security and justice – for the eternal peace envisioned by Kant - is questioned by the very fact of the extreme violence exercised within this global order. Therefore, narratives have to be invoked to explain the interruption and to subsequently close

the related gap again. The terminology used is revealing – peace has to be re-stored, the rule of law re-stored, the victim re-integrated...etc. With the prefix *re-*, suggesting that there once was this stable, closed order which has to be re-stored, re-paired and implying a certain progression of time – past – present – future. The narratives appeal to a closure that has to be re-stored, but which was, according to Lacanian theory, never there in the first place.

“In other words, ethical norms and legal rules create an illusion that politics with its means can overcome injustice in a society; but actually believing that political means will bring to life a perfect society rests on the assumption that this society was once just and equal and that shared moral principles are anchored in some material or mythical source which will reveal itself once the time is right.” (Zevnik 2016, p. 218)

3.2. Trauma theory and the (im)possibilities of healing

In Chapter two, I described the healing through participation narratives underlying the transitional justice rationale and the victim’s right to truth and justice. Individual and societal healing, reconciliation and the re-storage of trust – through telling one’s story is described as one of the possible benefits of participation in legal proceedings. Since the development of these narratives is closely related to a specific conception of trauma¹³³ and the interrelated image of the physically and psychologically wounded individual and society after mass violence, it is also referred to as the therapeutic ethic, which is thereby introduced into legal rationalizations (Fassin 2008; Bonacker 2012).

In this section, the therapeutic ethic is scrutinized as an ideological project to re-institute the fiction of the modern global order and the interrelated image of the subject. This conception of trauma not only exposes the aporias of healing, but also the fictive notion of a linear progression of time. In this vein, a radical re-reading of the narratives of truth and justice and healing through participation through this trauma theoretical lens can once again help to find the traces of the excluded, to search for the ghosts of victim participation in international criminal law and to reveal the inherent exclusionary violence of the underlying subject position.

¹³³ “PTSD, or post-traumatic stress disorder, is an anxiety problem that develops in some people after extremely traumatic events, such as combat, crime, an accident or natural disaster. People with PTSD may relive the event via intrusive memories, flashbacks and nightmares; avoid anything that reminds them of the trauma; and have anxious feelings they didn’t have before that are so intense their lives are disrupted.”, <http://www.apa.org/topics/ptsd/>, last accessed 29 June 2016.

The memory of the Holocaust and dealing with the survivors was the starting point for contemporary thought about individual and collective trauma and how to “deal with it” (Fassin and Rechtman 2009, p. 17). With regard to legal proceedings, the Eichmann trial was especially indicative of a new conception of trauma, the cathartic effect of telling and the link between individual stories and collective acknowledgement, memory and healing. For Fassin and Rechtman this connection between the individual and the collective, that is also underlying the right to truth and justice, has turned out to lie at the heart of what they call politics of trauma:

“Thus, in psychoanalysis the analogy between what is happening at the collective level and what is going on at the individual level establishes a connection which today lies at the heart of the politics of trauma: the collective event supplies the substance of the trauma which will be articulated in individual experience; in return, individual suffering bears witness to the traumatic aspect of the collective drama.” (Ibid., p. 18)

This connection between the individual and the collective is also underlying the rationales of the right to truth, justice and healing. According to Fassin and Rechtman, this is partly due to the psychological and cultural mode of representation which defines a new modality of expressing violence in terms of trauma and which can therefore serve as an expression of a state of the world (Fassin 2008, p. 532). Similarly, Zolkos holds that

“[T]he last two decades have witnessed a proliferation of various medical, psychological and therapeutic initiatives addressed at post-conflict political contexts, aiming at the investigation, management and prevention of mental health consequences of mass political violence. The concept of trauma has been at the core of these initiatives.” (Zolkos 2015, p. 168)

She goes on to explain that it is a very specific clinical conception of trauma that influenced the development of redress mechanisms:

“Importantly the conceptual framework of their engagement addresses trauma primarily within the rubric of PTSD, and places the process of therapeutic recovery at the cross section of the individual and the collective social realities.” (Ibid.)

Fassin and Rechtman claim that trauma has become a major signifier of our age and that the figure of PTSD “enable individuals to be described (by others) and identified (by themselves) in the public arena.” (Fassin 2008, p. 533) As a consequence trauma became a mean of relating present suffering to past violence and

is the basis for designing post-conflict redress mechanisms, like legal proceedings. Brunner calls this the medicalization of testimony through the label PTSD or more broadly traumatized (Brunner 2012).

The contemporary conception of trauma mainly relies on the definition of PTSD – the clinical notion and the transfer of the very same notion to a collective level. Critics argue that there is “often an excessive emphasis on trauma in transitional contexts, which coincides with the institutionalization of the distinctively Western therapeutic paradigm of PTSD diagnosis and the related “talking cure” (Zolkos 2015, p. 166). Furthermore,

“With regard to the mass violation of human rights that transitional justice seek to address, traumatisation of individuals and societies is considers the central subjective mediation of the post-atrocity State, the emphasis on trauma coincides with the emergence of the therapeutic modes of governance (Moon) where the State’s *raison d’être* is to achieve the psychosomatic well-being of the State subjects.” (Ibid., p. 165)

Addressing the suffering from PTSD is causally linked to re-storing a stable peace and re-establishing the social order into which the subject is then re-integrated. A causal relationship is affirmed between the overcoming of the individual trauma and successful societal reconciliation. The dignity of the victims has to be re-iterated and secured, the trust in the symbolic order re-build.

Accordingly, the underlying assumptions behind victim participation at the ICC is that

“victim’s participation empowers them, recognized their suffering and enables them to the establishment of the historical record, the truth as it were of what occurred. Victims play an important role as active participants in the quest for justice and should be valued in that way by the justice process. Moreover, their participation in the justice process contributes to the closing of the impunity gap and is one step in the process of healing for individuals and societies.”¹³⁴

This exemplifies that

“[D]espite of the scarcity of affirmative empirical findings, there has been a consistent and strong conceptual and political investment in constructing transitional justice as the way to address the effects of war on traumatized communities and bring justice.” (Ibid., p. 166)

¹³⁴ UN Doc. A/RES/60/147 (2006), Annex. ; ICC-ASP, Court’s Revised strategy in relation to victims (5 November 2012), http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf. Accessed 30 October 2014, para 10.

The reactions assume a certain underlying conception of trauma that is somehow illustrated in Jean Améry's elaboration on his experiences of torture and the effect on him. Namely, the conception of trauma as a wound, a bodily-altering injury causing a rupture and the absolutely defencelessness showing the "existential vulnerability articulated in relation with another person." (Ibid., p. 170) The therapeutic ethic of healing implicitly and sometimes explicitly (Möller 2003, p. 606) relies on a depiction of torture and its effects by Jean Améry, where he writes that with the first instance of beating, he lost his *trust in the world*. He describes the existential transgression of his bodily limits reducing him to pure flesh and the utter helplessness this caused:

"Not much is said when someone who has never been beaten makes the ethical and pathetic statement that upon the first blow the prisoner loses his human dignity. I must confess that I don't know exactly what that is: human dignity. I don't know if the person who is beaten by the police loses human dignity. Yet I am certain that with the very first blow that descends on him he loses something we will perhaps temporarily call "trust in the world". Trust in the world includes all sorts of things: the irrational and logically unjustifiable belief in absolute causality perhaps, or the likewise blind belief in the validity of the inductive inference. But more important, as an element in the trust in the world, and in our context, what is solely relevant, is the certainty that by reason of written or unwritten social contract the other person will spare me – more precisely stated, that he will respect my physical, and with it also my metaphysical, being. The boundaries of my body are also the boundaries of my self. My skin surface shields me against the external world. If I am to have trust, I must feel on it only what I want to feel. ... At the first blow, however, this trust in the world breaks down. The other person, opposite whom I exist physically in the world and with whom I can exist only as long as he does not touch my skin surface as border, forces his own corporeality on me with the first blow. He is on me and thereby destroys me." (Améry 1980, pp. 27–28)

What is derived from this depiction within the classical narratives of healing is a conception of trauma as a wound inflicted from the outside, and the related helplessness and dependence of the tortured subject. This is then often described as the objectification of the subject by the torturer – the reduction to flesh. As a consequence it is alleged that healing must *re-subjectify* and re-turn the lost dignity and the idea of re-storing the lost trust in the world occurs (Möller 2003, p. 606; Andrieu 2015, pp. 100–101). But, something which seems to be neglected which is already indicated in Améry's temporally definition of trust in the world, is that it is exactly the belief in the symbolic order, the social contract founding it and the basic understanding of causality etc. that is scattered – *beyond repair*.

“But with the first blow from a policeman’s fist, against which there can be no defense and which no helping hand will ward off, a part of our life ends and it can never again be revived.” (Améry 1980, p. 29)

And here lies the difference between classical conceptions of trauma underlying the healing through participation narrative and trauma theoretical thought from cultural studies. What the conventional conceptions seem to ignore is, that Améry, and in fact many others, described that something is lost *beyond repair*. Suggesting that breaking the silence and telling one’s story helps to turn the once objectified victims into active citizen subjects with dignity and trust in the world, the narratives violently ignore the impossibilities implied in this statement. They disregard three major points made by Améry: Firstly, that the experience is located at the limit of the capacity of language to communicate,

“It would be totally senseless to try and describe here the pain that was inflicted on me. [...] The pain was what it was. Beyond that there is nothing to say. Qualities of feeling are as incomparable as they are indescribable. They mark the limit of the capacity of language to communicate.” (Ibid., p. 33)¹³⁵

Secondly, that the shame of destruction cannot be erased and finally that the trust in the world will not be regained causing a feeling of foreignness.

“If from the experience of torture any knowledge at all remains that goes beyond the plane nightmarish, it is that of great amazement and a foreignness in the world that cannot be compensated by any sort of subsequent human communication. [...] Whoever was succumbed to torture can no longer feel at home in the world. The shame of destruction cannot be erased. Trust in the World, which already collapsed in part at the first blow, but in the end, under torture, fully, will not be regained.” (Ibid., p. 40)

It is exactly these three points, the impossibility of symbolizing trauma – *the limits of language*; the deconstruction of the Cartesian self – *the limits of the subject*; and the embeddedness of the subject in the social order – *the radical relationality with the other*, which is at the heart of Derrida’s and Lacan’s thought and which is revealed in this conception of trauma.

According to Lacan trauma is the missed encounter with the Real. Because there is no access to the Real in any case, the traumatic experience causes that the difference between Imaginary and Real is blurred. It can be conceptualized as an invasion of the Real causing a rupture in the Symbolic order which is a synonym for

¹³⁵ Elaine Scarry famously analysed this unspeakability of pain: Scarry (1987).

the description of trauma as unspeakable, as something that cannot be expressed in language. Correspondingly, losing the trust in the world is a rupture in the symbolic order within which subjects are constituted. This rupture of the symbolic frames that constitute meaning, leaves the traumatized with an experience beyond communication, because what falls outside the commonly constituted framework cannot entirely be expressed within this framework.

“The trauma is the confrontation with an event that, in its unexpectedness or horror, cannot be placed within the schemes of prior knowledge. [...] For the survivor of trauma, then, the truth of the event may reside not only in its brutal facts, but also in the way that their occurrence defies simple comprehension. The flashback, or traumatic re-enactment conveys, that is, both the truth of an event, and the truth of its incomprehensibility.” (Caruth 1995b, p. 153)

In such flashbacks, the linear time-frame, which is constitutive of our shared symbolic order, and which is a crucial component of the narrative of international criminal law, is radically called into question. Traumatic events are re-lived as a continuous present and accordingly resist becoming past events for the traumatized (Assmann et al. 2014, p. 13). “Trauma undoes the self by breaking the ongoing narrative, severing the connections among remembered past, lived present, and anticipated future.” (Brison 1999, p. 41)

Trauma bars its signification, it evades its integration into the symbolic order. This is not to say that victims of traumatizing violence cannot articulate their experiences, it is to say that there always remains something that is not expressible in ‘our’ language, something that is radically calling into question ‘our’ symbolic order. Hence,

“Trauma, is the betrayal of a promise or an expectation. Trauma can be seen as an encounter that betrays our faith in previously established personal and social worlds and call into question the resolutions of impossible questions that people have arrived at in order to continue with day-to-day life.” (Edkins 2006, p. 109)

Accordingly, Brison, referring to Améry explains that feeling at home in the world is as much a physical as an epistemological accomplishment (Brison 1999, p. 44). Trauma constantly remind us of the impossibilities, the aporias and hence the lack in our centre. It reminds us of the fictitious character of social reality that is constantly constructed and re-constructed through language and the striving for

closure. 'Trauma radically defers closure, because it is a present past that cannot "be put behind", it cannot simply be overcome (Ibid., p. 49).

By the same token, the Cartesian self is destroyed, as Améry puts it. Like described in the mirror stage by Lacan, Améry conceived of his outer boundaries – his skin – as the boundaries of the self, which is at the same time the metaphysical being. This fictitious conception of the I is destroyed through extreme violence. Repeatedly, traumatized victims state that they are not the same as they were before the violent experience.¹³⁶

"Traumatic memory blurs the Cartesian mind-body distinction that continues to inform our cultural narrative about the nature of the self." (Ibid., p. 42)

Trauma destroys the sense of the self as continuing over time. Thereby it also reveals, what Jenny Edkins calls radical relationality, namely, the always already embeddedness of the subject within the symbolic order, the imaginative character of the image in the mirror. This revelation of radical relationality is twofold. On the one hand it is, as described by Améry, the relationality that is betrayed by radically violating the skin as boundaries vis á vis the other and as confinement of what we conceive of as the Self. On the other hand, this betrayal shows that radical relationality is constitutive of our subject position which is normally forgotten to maintain the fiction of the identical autonomous subject (Edkins 2006, p. 108).

"The radical relationality of bodies, and of bodies and other 'things', is revealed; traumatic events tear us from ourselves, bind us to others, transport us, undo us, implicate us in lives that are not our own, irreversibly, if not fatally. [...] this vulnerability consists in and is comprised of our radical relationality." (Ibid., p. 110)

For the containment of the symbolic order the traumatic event¹³⁷ and the representatives thereof, the victims of traumatic violence pose a danger, because they represent the revelation of the mutual fiction.¹³⁸ In reaction to this, within the

¹³⁶ Primo Levi is one of the most famous among the survivors: Levi (1995).

¹³⁷ To conceptualize this radical experience and to explain it within its political and cultural meaning, different terms were developed: Anne Fuchs calls it impact event, referring to Badiou and Žižek, Jenny Edkins calls it trauma time.

¹³⁸ I deliberately do not call the lack at the centre around which the fiction is built – traumatic lack, or traumatic kernel, since it would, and here I agree with Fassin and Rechtman Fassin and Rechtman (2009), in a way trivialize the trauma caused by extreme violence. I nevertheless refer to Cathy Caruth's conception, which they call humanist Caruth (1995a) and Žižek's understanding that they call radical, because I do not agree with them that the universalization of the description of trauma in itself is a

symbolic order, narratives are formed to contain and manage and consequently fill the gap left by the traumatic experience.

“Trauma is clearly disruptive of settled stories. Centralized, sovereign authority is particularly threatened by this. After the traumatic event, what we call the state, moves quickly to close down any openings produced by putting in place as fast as possible a linear narrative of origins.” (Ibid., p. 107)

Now, this narrative is ambivalent. On the one hand, as Brison explains, it is essential to re-claim the self after trauma. A narrative memory has to be formed in order for the victim/survivor/traumatized to reconstruct a self within the symbolic order “in the sense of a remembered and ongoing narrative about oneself.” (Brison 1999, p. 45) The healing through participation narrative is relying on this necessity. However, and this already became apparent in the misappropriation of Jean Améry, this narrative has to be reflective of the inherent impossibilities of closure. Hence, and this is the crucial aspect, the narrative is at the same time impossible because, “our language lacks words to express this offense, the demolition of a man.” (Ibid., p. 50 citing Primo Levi) This does not mean that we do not have to speak about trauma because we have no adequate language. Quite the contrary, according to this understanding of trauma, we are forced to speak about it, because there will never be the right words. Like the deconstructive stance on justice, understanding trauma raises the stakes for healing. It is our responsibility to continuously listen because trauma will never have been dealt with for the survivors.

Without being reflective of these (im)possibilities and without being radically open to the absolute unpredictable, the narrative of healing through participation and truth and justice through law are not only not reflective of the inherent violence as demonstrated by Derrida and Lacan, they, by the same token, violently impose symbolic images that force (im)possible closure on traumatized victims. As could be seen from the underlying assumptions of the right to truth and justice, as trauma narratives, they explain the rupture within the symbolic order and temporalize it by

trivialization. Because, I think that, given the radical relatedness, one has to take into account the cultural – implying political and legal – dimension of trauma. Since, and here again I would concur with Žižek, the aspiration to overcome, to fill the “traumatic kernel” – the lack at the centre – is a totalizing tendency that can lead to extreme violence committed in the name of an ideology propagating the man as harmonious being without antagonistic tension. The traumatic violence experienced by those who suffered from this exact ideology and the related extreme acts of violence and destruction, reveal the lack – and the ideology connected to filling the lack. Žižek (2008).

allocating it into the past, that is overcome by the present. This present time is not violent, but the time for the re-institution of the rule of law and everything this entails. “The Victims” should tell and contribute their story, because it is said to be essential for them to heal. Within the symbolic order these narrative framing of individual and collective trauma serves to “overcome” and to “move on”. The symbolic frames constituting the subject and the society within the symbolic order are re-instituted by implying that the subject can be healed and that traumatic violence can be “dealt with”.

But, just as the decisions taken in legal procedures, these narratives communicate their own inadequacy, they bear the traces of impossibility within them. The representatives of the traumatic violence radically call into question the very symbolic framework that is attempted to be re-instituted. Survivors and their traumatic experience then are at the same time those who have to be re-integrated and those who represent the impossibility of integration and with it the aporias of law. But, and this is a revenant: The clear cut difference of past and present is questioned by traumatic experiences – trauma is the insurmountable present of the past. It is an ongoing present of a non-experienced present in the past. An image that is often used to describe this present absence, or absent presence, is, not entirely coincidentally, the ghost haunting the living (Assmann et al. 2014, p. 13). And this, again, opens up a possibility for reflection of the inherent exclusionary violence entailed in the symbolic order.

4. Whose truth? Whose justice?

Post-colonial critique, sits uneasily within the theorization of international law, because, just like deconstruction, it challenged the foundations, questions its origins and reveals the inherent founding and perpetuated violence that is obscured by notions of universality, humanity, justice and the Eurocentric conception of the subject and trauma. And while up to today, all cases at the ICC are situations from the African continent, there is hardly any post-colonial analysis of this fact. Being aware of the post-colonial situatedness does not mean to acknowledge the violent colonial past, but to consider the continuity of epistemic violence within the narratives described in the first and second Chapters reproduced over and over again.

For the purpose of this work, post-colonial critique reveals the hierarchical structuring of representation within the global order which can also be traced in the representational practices of the victim as the other in international criminal justice. Post-colonial critique makes the power structures underlying textual representations of the others visible and addressable by unearthing the naturalization of hierarchies within the narratives of progress and universality.

4.1. The hierarchy in representation

In the narrative of international criminal law and its relation to victims of mass violence, the idea that perpetrators are held accountable is portrayed as the victory of law over politics, a milestone of civilization following a modernization rationale of progress. Especially those who argue that international criminal law is an expression of the Kantian thoughts of internationalized citizenship, argue for the general applicability of originally Western laws on the basis of what they assume as the universal essence of the human nature – human dignity.

“They call human rights transhistorical and “natural”, yet they are drawing on a particular tradition (i.e. the Western liberal rights tradition of Euro-North America), and on a political history that originates in granting rights to few (male property owners) and denying them to many (women, nonpropertied classes, non-white people). The end result is that the promulgation of human rights amounts not to the promotion of universal rights, but to the universalization of the Western legal tradition.” (Kapoor 2008, p. 82)

The West and its philosophical tradition of Enlightenment is represented as the site of progress ignoring the extreme (foundational) violence on which this alleged progress was based and excluding discussions on the still ongoing violence that is based on the post-colonial entanglements, mainly in the socio-economic field. Hereby it is neglected that modernity itself is a cultural system, and, as Koskeniemi analysed, referring to modernity, it was always European modernity that was referenced, as the idealized Europe, nationhood, capitalism, liberalism, the rule of law mark the horizon of imagination and “Europe is their geographical, political and conceptual centre.” (Koskeniemi 2011, p. 154)

Hand in hand with this idealization, Europe could demarcate itself positively from the non-modern, non-liberal, un-civilized etc.

“Although there was never a clear-cut standard of civilization, the language of civilization remained to mark a difference that seemed palpable but that did not yield itself to a detailed articulation. It became a practical instrument for managing difference and satisfying oneself of the moral power of the law.” (Ibid., p. 156)

Portraying the West and European ideas as rational, peaceful, liberal, logical can be seen in a continuity from colonial times, through decolonization struggles to post-colonial times¹³⁹ – the others are respectively portrayed to be irrational, violent, illiberal etc. The differential identity formation and the respective representations of the one and the others is hierarchically structured.

“...The relationship between Occident and Orient is a relationship of power, of domination, of varying degrees of complex hegemony...what we must respect and try to grasp is the sheer knitted together strength of Orientalist discourse, its very close ties to the enabling socio-economic and political institutions, and its re-doubtable durability.” (Said 1978, pp. 5–6)

The roots of the narratives that naturalizes differences and universalizes Western philosophical and legal concepts, goes back to colonialism and has become a cultural hegemony. Especially the interrelatedness with socio-economic and political institutions is broadly ignored portraying the institutions as unpolitical and neutral. For international criminal law generally and the ICC in particular,

“Constructions of both the criminal and the victim are normalised by their genealogy in historical tropes of the African subject, which emphasise the distinction between civilisation and barbarity. The representation of the criminal utilised by the ICC builds on oppositional binaries of past and future, in which criminal Africa is seen as the status quo of the present and the past, while lawful Africa creates a stark contrast and elicits a hopeful vision of a radically different future. The self-image of international law as a natural progression towards the critique of the abuses of modern statehood is framed through the continued reification of the parallel dichotomies of criminal–victim, insider–outsider and civilisation–barbarism.” (Sagan 2010, p. 10)

Simultaneously, this portrayal together with the depiction of human rights as universal forms a narrative of urgency to intervene on behalf of the „African victim“s. Demarcating a clear distinction between good violence and bad violence –

¹³⁹ The term postcolonial is controversial, some would claim that the post suggests that colonialism and its violence is over and done with, they emphasise that it is still about de-colonization in a cultural (Understood broadly) meaning. I do not disagree, but I think it is clear that postcolonial theory is exactly about the post – effect of colonialization and the (im)possibilities of decolonization cultural-wise. There is no pure decolonized subject that can be rescued, we are all entangled in the symbolic order and there is no returning to something untouched.

civilized and uncivilized violence and totally ignoring the own economic and political complicity in this violence, the narrative is inherently forgetful.

“...the ‘distinction between “civilized” and “barbarian”’ represents an ‘entrenched logic ... within the Western political imaginary’. This distinction is descriptive of other dichotomies, including masculinity and femininity, as well as what Hutchings refers to as “‘good” violence’ which is ‘associated with the controlled and civilized violence of the state and “bad” violence with the supposedly uncontrolled violence of the racialized tribal or barbarian “other”... The victim at the ICC is a signifier of the beneficiaries of the protection provided by cosmopolitan society and its covenants, such as the Rome Statute.” (Ibid., p. 16)

The portrayal of the other, hence, tells us a lot about the idealized picture we want to draw of ourselves and the obscured, normalized violence inherent in this image. As we could see from Derrida and Benjamin, the inherent violence in law and legal decisions is normalized violence it is the justified violence and therefore does not even count as violence anymore, but it has to rely on the *other* violence which is aberrant, extreme to be conceived as normal and necessary. The aberrant violence committed by the others calls for urgent intervention by the West, re-instituting the international and national rule of law, justifying its own interventionist violence.

At this point, post-colonial critique and -politics aim at re-turning the gaze at ourselves and to critically reflect the Eurocentric ideals and the epistemic violence within these representational practices.¹⁴⁰ The “universal teleology of progressive humanitarianism” (Koskeniemi 2011, p. 156) appealed to in the narrative of fighting impunity and bringing truth and justice for victims, always ignored the, at the time of Nuremberg still ongoing colonial violence. And, when the colonies fought for independence, and the colonial violence, committed, for example in former French Algeria became apparent, there was no cry for urgent legal intervention to re-install the global rule of law. The crimes committed by the Nazis were said to be the first instance of racially-doctrinated mass violence ever. Interestingly, Hannah Arendt mentioned the possibility that courts in Ghana or Congo could take the Eichmann trial as a precedent and initiate trials against advocates of apartheid (whom they kidnapped in the U.S. but it is not quite clear if it is only the kidnapping, or the trials

¹⁴⁰ Epistemic violence in its “clearest available example ... is the remotely orchestrated, far-flung, and heterogeneous project to constitute the colonial subject as Other. This project is also the asymmetrical obliteration of the trace of that Other in its precarious Subject-ivity.” Spivak (1988, p. 76).

as such that she was worried about) which she found to be highly worrisome because of the respective violation of sovereignty (Arendt 2013, p. 386). This demonstrates the double standard when it comes to the noble fight against impunity.¹⁴¹

In psychoanalytical terms, in order to uphold the fiction of the idealized global order, the intertwined structural violence has to be ignored – or justified – and with this, differentiations in the framing of suffering and victimhood are introduced. Or, using Butlers terminology, the epistemological framing of violence and suffering determines who counts as lose-able or injurable and who does not, and this framing is inherently racist and sexist and depends on a Western conception of modernity and subjectivity (Butler 2010).

In the “differentiating order of otherness” (Bhabha 2004, p. 45), the construction of the *rational, impartial, objective* international criminal courts, relies on its others, who are portrayed to be *irrational, partial, subjective*. By referring to the theoretical underpinning of the universality of the modern understanding of legality and human dignity, this dichotomic representation is normalized. For the ICC this implies that the differential identity construction described in the first chapter is hierarchically structured. According to the modern ideal, rationality is valued over emotionality, impartiality over partiality, objectivity over subjectivity and the latter are always at the same time constituting and endangering the identity of the court.

4.2. We right your wrongs?

The narrative of truth and justice for victims is intimately tied to the paternalistic notion of Western intervention on behalf of „*African victim*“s. They are portrayed as incapable of finding the truth and justice because African states lack the necessary structural pre-condition – the (criminal) legal system capable of trying international crimes. Accordingly, the history of the development of human rights as individual subjective legal claims is described as a failure of nation states (Safferling 2004, p. 1475) and the function of the ICC is “to recover the universality of law, its equal application to all, by re-establishing individual rights” (Humphrey 2003, p. 498). This re-establishment of human rights “necessitates the sword of international criminal law enforcement.” (Bassiouni 2013, pp. 46–47) The language used is telling, the state

¹⁴¹ At the same time, Hannah Arendt denounced the racist violence in the colonies and drew a line between colonial violence and the Holocaust. Arendt (1968).

is compared to parents and the citizens to children to then draw the analogy to the intervention of the state when the basic rights of the child are violated. Accordingly, the “African parents” fail their children and the ICC has the moral duty to intervene on behalf of the “African children”.¹⁴²

Above that, the concept of trauma and its treatment underlying transitional justice narratives of healing can be located in a variety of medical and psychological discourses dealing with European and American experiences (Craps 2014, p. 48). The underlying assumptions illustrating this bias are the clear distinction of past violence – present dealing and healing – making the subject “whole” again – and the future that is described as providing the necessary peace and security based on the re-instituted symbolic order. The assumption that the patient is returned to a state of stability and security is just an illusion, given the living conditions of many of the victims who still have to struggle to make a living. In many cases the conflict has destroyed the basis on which people had survived, which was often already precarious before. Therefore, while the fiction of the peaceful and secure modern global order is re-installed and is said to ensure the safety of all human beings, the structural violence underlying this global order continues and is excluded from the realm of violence that counts. Its visibility would question the clear demarcation of past – presence – future and reveal the continuity of violence inherent to the re-installed symbolic order. Also, in countries where civil war is ongoing for a long period of time, many people might never have had the experience of peace and security – hence, the re-storage is literally impossible. “Western standard of normality – are actually the exception rather than the rule” (Ibid., p. 53) As a consequence, these narratives are deemed to fail to depict the “reality” of many of the victims. The narrative of healing and re-storing trust aims at re-storing the symbolic order constitutive for our sovereign state system and thus is reproductive of a global order, based on the same Western conceptions and its inherent structural violence. This conception of trauma as curable implicitly enforces a certain conception of relevant violence causing relevant trauma and thereby normalizes the structural violence inherent in the global world order. Or in the words of Frantz Fanon:

¹⁴² Altman and Wellman (2004, p. 45): “If a parent is either horribly abusive or woefully negligent, third parties have a moral right, and perhaps even a duty, to interfere on the child’s behalf.”

“If psychiatry is the medical technique that aims to enable man no longer to be a stranger to his environment, I owe it to myself to affirm that the Arab, permanently an alien in his own country, lives in a state of absolute depersonalization...The social structure existing in Algeria was hostile to any attempt to put the individual back where he belonged.” (Fanon 2008, xxiii foreword by Homi Bhabha)

More abstractly, the post-colonial subject position challenges the Western notion of closure and independence, because it reveals the dependence of the symbolic order, its production within the process of signification and the respective differential relation to its African other.

“The social virtues of historical rationality, cultural cohesion, the autonomy of the individual consciousness assume an immediate, Utopian identity with the subjects on whom they confer a civil status. The civil state is the ultimate expression of the innate ethical and rational bent of the human mind....For Fanon such a myth of Man and Society is fundamentally undermined in the colonial situation...Finally, the question of identification is never the affirmation of a pre-given identity, never a self-fulfilling prophecy – it is always the production of an image of identity and the transformation of the subject in assuming that image. The demand of identification – that is, to be for an Other – entails the representation of the subject in the differentiating order of otherness. Identification, as inferred from the preceding illustrations, is always the return of an image of identity that bears the mark of splitting in the Other place from which it comes.” (Bhabha 2004, p. 45)

What follows from this? Contrary to the accusations of relativism and/or that this critique has a paralysing effect, post-colonial thinkers have developed multiple strategies addressing the entanglement in post-colonial violence. The epistemological frames determining grievable life, the “worlding” of what is today called the Third World (Spivak 1985, p. 247) are structured by language and therefore they are instable, temporal and slippery. The consolidation of a world order defined by modern states of a European origin aspires wholeness and closure and fails, encountering the inherent lack – the aporia. And once again the critical potential lies exactly within this aspiration for and subsequent failure in the striving for wholeness. In the post-colonial conceptualization – the potential is discussed under hybridity and hyper self-reflection of the impossibilities and the embeddedness. Again, criticism cannot claim a space outside, referring to Derrida, critique is itself a process of signification and therefore always already inside the narrative or discourse. Similarly, Lacan would hold that we cannot step outside the symbolic order structured by language, because we assume subject positions through language. Therefore, the inherent epistemic violence in the dominant narratives – the

exclusionary violence entailed in the symbolic order's interrelationship with the Real. And the resulting aporias entail enabling violence and "their enablement must be used even as the violation is renegotiated." (Spivak 2004, p. 524)

This also applies for the conception of trauma underlying the healing through participation narrative. The image of the traumatized victim on whose behalf the Western court has to re-install the universalized symbolic order of human rights and the rule of law into which the victims have to be re-integrated to re-assume the autonomous subjects position necessary to re-claim said rights, is inherently unstable. It is 'split' in its 'enunciations' of closed identities and subject positions so that 'in every practice of domination the language of the master becomes hybrid' meaning haunted by ghosts (Kapoor 2008, p. 32 referring to Homi Bhabha). And yet again, the focus must lie on these ruptures within the mutually constitutive images that are deemed to fail, leaving the justice gap:

"Lacan has elaborated as the 'process of gap' within which the relation of subject to Other is produced. Although these images emerge within a certain fixity and finality in the present, as if they are the last word on the subject, they cannot identify or interpellate identity as presence. This is because they are created in the ambivalence of a double time of iteration that, in Derrida's felicitous phrase, "baffles the process of appearing by dislocating any orderly time at the center of the present. The effect of such baffling ... is to initiate a principle of undecidability in the signification of part and whole, past and present, self and Other, such as there can be no negation or transcendence of difference." (Bhabha 2004, p. 54)

5. (Im)possible ethics

"The ethical act cannot look for guarantees within ethics itself: ethics by definition cannot define what is ethical, because what is ethical is what breaks and remakes the parameters of ethics. For the same reason, the ethical act is not only illegal, but beyond legality: it re-defines the parameters of what is legal and what is illegal. Rather than presupposing any notion of the Good. The 'subject' therefore cannot be said to be obeying or disobeying the law as the act re-defines what the law is." (Aristodemou 2014, p. 240)

From the foregoing it became obvious, that the approaches discussed refuse to draw a horizon for justice – there is and never will have been a fixed definition, or defined requirements to reach a just world, because justice and ethics accordingly always exceed signification. Consequently, according to these readings, the legitimizing narratives of international criminal law that are called upon to justify the

interventions in the name of law and that try to fix justice to a given notion of the global order and the related concepts of truth, justice and the subject are deemed to fail.

This failure is reflected in the justice gap haunting international criminal law. Neither of the legitimizing theories invoked in the international criminal justice debates can satisfactorily legitimize the positing violence of international criminal courts. The classical theories of punishment fail when applied to the international level.¹⁴³ Read through the developed theoretical lens this justice gap – the failure to convincingly legitimize international criminal law – is inherent in all theoretical attempts that draw a horizon for justice through law and therefore reach for closure. Furthermore, these narratives communicate their own inadequacy of closure after mass violence and hence new narratives have to be produced to continuously fill the gap. One narrative, produced to fill the justice gaps left by the first courts is that international criminal law, beside and through trying individuals for war crimes, crimes against humanity and genocide, can bring truth and justice to victims and thereby heal their and the societies' traumatic wounds. But, just as the previous limitation to "purely retributive" purposes, law's invocation of truth and justice is the legitimizing working assumption which will never have been fulfilled, because there is a lack at its centre – the Real.

"In this way, we could read ... the graph as designating the dimension 'beyond interpellation': the impossible 'square of the circle' of symbolic and/or imaginary identification never results in the absence of any remainder, there is always a leftover which opens the space for desire and makes the Other (the symbolic order) inconsistent, with fantasy as an attempt to overcome, to conceal this inconsistency, this gap in the Other." (Žižek 2008, p. 139)

Accordingly, the narratives of truth and justice through law and its underlying assumptions of the subject are fictions aspired for, but never reached. International criminal law is always also a matter of faith, it is a fantasy masking the inconsistencies in the symbolic order and a compensation for failed identification. "Fantasy is a means for an ideology to take its own failure into account in advance." (Ibid., p. 142)

¹⁴³ Many of these theories are also highly controversial within domestic criminal law. See, Loick (2012).

But this faith is a Eurocentric re-affirmation of a global symbolic order that constantly re-produces its others and thereby re-produces a symbolic order burying its inherent exclusionary violence and the lack at its foundation. Post-colonial critique reveals that the representational practices of differential identity formation, necessary to uphold the fiction of closure, is hierarchically structured. The rational, impartial, objective Western court relies on the irrational, partial and subjective image of the victims on whose behalf it works to legitimize and constitute its existence.

Victims with their memories of traumatic violence represent at the same time the constitutive emotional other of international criminal law and the potentially overwhelming Real. They stand for the impossibilities of closure and the radical relationality of subjectivities. The narrative of healing through participation and truth and justice for victims then suggests the possibility of the re-integration of these victims into the symbolic order built on the fiction of closure and autonomy. This again can only be a fictive closure which is not confronting the impossibility of symbolizing trauma – the limits of language– the limits of the subject; and – radical relationality.

The critical potential of these theoretical thoughts is that it reveals the aporias, the lack, the impossibilities of symbolization and the related exclusionary epistemological violence. But they go beyond mere critique. All of the approaches indicate that the critique is the starting point to go beyond fixed understandings of justice, truth and the subject. They locate these *beyonds* exactly within the impossibilities of justice and identity.

Be it Derrida, who appeals to the justice to come, *im Kommen*, or *à venir*.

“Paradoxically, it is because of this overflowing of the performative, because of this always excessive haste of interpretation getting ahead of itself, because of this structural urgency and precipitation of justice that the latter has no horizon of expectation (regulative or messianic). But for this very reason, it may have an *avenir*, a “to come” which I rigorously distinguish from the future, that can always reproduce the present. Justice remains, is yet, to come, *à venir*, it has an, it is *à-venir*, the very dimension of events irreducibly to come. It will always have it, this *à-venir*, and always has.” (Derrida 1990, p. 967)

The future loses its openness, the coming of the other (who comes), without which there is no justice; and the future can always reproduce the present, announce itself or present itself as a future present in the modified form of the present.

Or, the psycho-analytical approach to the recognition of the lack at the centre which is the

“freedom from symbolic links, where the empty place is acknowledged and confronted in all its abyssal emptiness rather than being filled with idolatrous gods from laws to goods. It is the hallmark of an ethical subject who, difficult as that is, has finally come to terms with her own lack as well as that of the big and small others around her. The Other, in other words, is finally acknowledged to be just like the subject herself: divided, lacking, impotent.” (Aristodemou 2014, p. 386)

Taking this as a starting point, trauma theoretical approaches see the acknowledgement of radical relatedness revealed through trauma as a possibility of resistance to the fixed conceptions of the modern rule of law and the related subject position – and therefore to the ideology of our symbolic order: “Memories of trauma are, potentially, a mode of resistance to a language that forgets the essential vulnerability of flesh in its reification of state, nation and ideology.” (Edkins 2006, p. 100)

When trauma reveals the radical relatedness that being embedded in the symbolic order implies and the fragile and fictional character of this order, it involves “the recognition of realities that most of us have not begun to face.” (Caruth 1995a, vii) It is the encounter with the other, with the unrepresented, with the excluded, with the impossibility of the self without the other that is recognized to be a precondition of resistance and the political:

“[h]ybridity initiates the project of political thinking by continually facing it with the strategic and the contingent, with the countervailing thought of its own ‘unthought’. It has to negotiate its goals through an acknowledgement of differential objects and discursive levels articulated not simply as contents but in their address as forms of textual or narrative subjections – be they governmental, judicial or artistic.” (Bhabha 2004, pp. 64–65)

Consequently, a critical analysis of the practice of victim participation needs to refrain to strive for closure and instead look for the openings and gaps within the representational practices implied in the textual and narrative framework of victim participation.

Part II

Chapter 4: Methodology

1. Bridging the gap between the theoretical and the empirical

This chapter draws the connection between the theoretical conceptions and the empirical research on the organization of victim participation and representation at the ICC. I will lay out the premises guiding my approach and discuss the consequences of the theoretical thoughts for the methodological concept chosen to analyse the practice of victim participation. In a first step I will elaborate on the ethics developed from the theoretical beyonds of justice discussed in the previous chapter. As already indicated, contrary to the criticism of relativism, the assumption of non-foundation of truth, justice and healing does not lead to giving up the very ideas of truth and justice. Instead, the conceptions of truth and justice raise the stake for justice, since they take into consideration the always already inherent exclusions. Therefore, I will rely on the ethics of representation, the ethics of listening and the idea of measuring and enduring silences in order to develop the questions leading my empirical work and the resulting approach to the organization of victim participation.

Accordingly, drawing on the ethics of representation, the representational practices have to be reconstructed to trace the in-and exclusions within the practice of participation. The question is who speaks for/about/on behalf of whom? Drawing on the ethics of listening, the structuring of speaking and hearing has to be revealed. And drawing on the idea to measure and endure silence, the subject position of *the victim* has to be reconstructed in order to find the space within the organization of participation and representation from which the participating victims can be heard. Against the backdrop of the assumption of differential identity formation, when reconstructing the representational practices, I ask: How is the image of the victim and the court mutually reproduced within the practice of representation – the organization of participation and representation? And, taking into account the beyonds of truth and justice, the gaps and irritations within the representations have to be analysed to trace their resisting potential to closure within the practice of participation.

As developed in the first Chapter, the binary image of *the victims* and the international courts cause irritations when victim participation is practiced at the courts. Therefore, to reconstruct the practices of participation and representation and to go beyond the legitimizing images, I had to approach the behind the scenes day to day work at the ICC. Hence, I will discuss organizational ethnography as a set of methods, participant observation, interviews and document analysis, that enabled me to operationalize my approach. Since ethnography demands heightened self-reflexivity from the researcher, I will reflect on my positionality within the organization and the ethic implications of representing the practice of victim participation and representation within my own research. The purpose of this chapter is to render my approach transparent and to reveal the pre-conditions for the knowledge produced in this dissertation.

2. Ethics of representation

“Our encounters with, and representations of, our ‘subjects’ are therefore coded or framed in terms of an us/them dichotomy in which ‘we’ aid/develop civilize/empower ‘them’. Changing this relationship is not a question of mere good intentions or semantics...So caught up are we in this coding that it becomes important in our encounters with the Third World to ask who represents, and what baggage positions us in this us/them manner.” (Kapoor 2008, p. 92)

In order to scrutinize the representational practices vis à vis participating victims at the ICC, the implication of ‘our’ representations have to be reflected. The ‘baggage’ analysed and the relationality revealed to trace the exclusionary inherent violence. This was already addressed in the previous chapter. Here, I want to reify this theoretical position drawing on Spivak’s ethics of representation to carve out the questions that guided my empirical approach.

For Spivak, the epistemic violence of imperialism has meant the transformation of the Third World into a sign, the production of which has been obfuscated to the point that Western superiority and dominance are naturalized. In the above quote, this is referred to as the us/them dichotomy, in which we aid/develop - bring truth and justice to them. One means of this naturalization, according to Spivak, is the conflation of representation as speaking for (*Vertretung*) and re-presentation as speaking about (*Darstellung*). Whereas speaking for implies a mandate, speaking

about draws an image of the represented. Both meanings are implied in representation, but once they are conflated and not rendered transparent, the own complicity in silencing those for/about whom one claims to speak is obscured. As a consequence, the image drawn represents an allegedly coherent subject, which for-closes all other subject-positions. The image determines the subject position from which one is heard within the episteme and this image is always already a representation in the sense of *Darstellung*.

The critique takes into account the embeddedness of listener and speaker within post-colonial symbolic order that has yet to be decolonized. Referring to Derrida, Spivak emphasises that there is no critique from outside which implies that not speaking for the subaltern is never an option, because the subaltern in any way cannot be heard within the post-colonial patriarchal episteme framing what can be heard and said (Spivak 1988). In a critique of Foucault and Deleuze she shows that in claiming not to speak for the subaltern, they render themselves transparent within the episteme and thereby neglect their positionality in the re-production of the Third World as Other and, in turn, Europe as the Subject (Ibid.). From thereon, Spivak develops what Kapoor calls the post-colonial ethics of representation. Similar to trauma theoretical approaches, speaking and listening, according to this approach, form a mutually constituting union – “speaking and hearing complete the speech act.” (Kapoor 2008, p. 112) The self-reflexive listener and representative has to differentiate between representation in the sense of *Vertretung* – speaking for, being mindful of the mandate and authorization – or lack thereof, and representation as *Darstellung* – speaking about. And, by the same token, learning to represent implies learning to re-present (*darstellen*) ourselves within the representational relationship. “To confront them is not to represent (*vertreten*) them but to learn to represent (*darstellen*) ourselves.” (Spivak 1988, pp. 288–289) Derived from these theoretical thoughts, it is always also returning the gaze on ourselves. Returning the gaze on the European Subject that seeks to produce the Other and others that would consolidate its subject status. “The itinerary toward representing the Other ‘over there’, requires scrutiny of the ‘here’. Or it necessitates reversing the gaze...” (Kapoor 2008, p. 115)

2.1. Who speaks for / on behalf of whom

For the analysis of victim participation and representation at the ICC this means that the representational relations have to be reconstructed to ask: Who is speaking for whom - who is speaking about whom, when are the modes of representation conflated and what does this imply within the practice of participation. Which image of *the victim* is represented and what does this imply for the image of the Self - the court - or the representatives? Furthermore, the spaces for a reflection of the modes of representation have to be detected.

According to this understanding of representation, the practical organization of representation has to be traced. How is representation organized - from the selection of a representative to the communication with the clients to the drafting of submissions and the presentation of views and concerns on behalf of these clients. This is the practical organization of representation. Furthermore, drawing on the described understanding of representation, the *speaking about* dimension has to be taken into account. This means that the image of *the victim* drawn within the implementation of victim participation - the representation of the victim - has to be carved out. How are the victims described in the legal texts, the informal texts, by their representatives etc. Thereby the twofold meaning and the silencing effect of representation can be analysed and described.

3. Measuring silence

“The archival, historiographic, disciplinary-critical and, inevitably, interventionist work involved here is indeed a task of ‘measuring silences’. This can be a description of ‘investigating, identifying, and measuring...the ‘deviation’ from an idea that is irreducibly differential” (Spivak 1988, pp. 286–287)

According to Spivak, “the task of measuring silences, whether acknowledged or unacknowledged” becomes relevant when critically engaging with victim representation (Ibid., p. 286). In this vein, silence and silencing are intimately linked and therefore listening to silence always also implies “returning the gaze” to the silencing practices inherent in differential identity constitution. Since what is being heard within the representational practices is determined by the us/them dichotomy described in the previous section. As described in the first chapter, we are rational -

they are emotional etc. (Kapoor 2008, p. 163) With regard to the “ideological refusal” to represent otherwise, the omissions of dealing with colonial violence in the historiography of international criminal justice, described in Chapter 3, spoke volumes. The selection of cases chosen as representative within the success story of international criminal justice in the legitimizing narratives has to be exclusive in order to draw and maintain the image of international courts as rational, objective, unpolitical. Thus, the representation of these courts as the suppliers of truth and justice and contributors to the progression of humanity is upheld. The images drawn rely on these silences, that which is omitted, which have to be measured in order to disturb these images and to reveal the inherent exclusionary violence.

3.1. What is heard? The subject positions

Re-turning the gaze implies that special attention must be put to the mutually re-producing images of the victim from the global South and the European idea of justice incorporated in the operation of the ICC. Which narratives are stabilized by othering the emotional victim, and how does the inherent exclusionary violence manifest in the practice of victim participation and representation. Where does the silencing take place within the practice of victim participation and representation. Which subject position of *the victim* is constituted within this practice. Which position do the participating victims have to assume to be heard within the episteme of the organization? What is silenced through the representation of this subject position?

4. Ethics of listening

„The difficulty of listening and responding to traumatic stories in a way that does not lose their impact, that does not reduce them to clichés or turn them all into versions of the same story, is a problem that remains central!” (Caruth 1995a, vii)

This quote refers to the challenge of listening to traumatic memory withstanding the urge to fill the gaps in the symbolic order by reproducing clichés and reducing its complexity, depriving the stories of their unique character. Both, listening and representing within a post-colonial setting and listening and representing traumatic memory requires heightened self-reflexivity and the ability to listen. Taking the idea of radical relationality revealed through traumatic experiences seriously implies that listening is always also enduring silence - enduring not to answer - not to know.

Silence vis á vis traumatic violence and the silence of the subaltern within the Western episteme of listening is a central aspect when reflecting on the (im)possibilities of listening to and translating victims' stories, a central aspect in representation. While representation is always also silencing, silence might have a deferring potential in the reach for closure.

Silence, accordingly, is one signifier for the gap, and enduring the silence is therefore an (im)possible, yet urgent endeavour in taking the gaps seriously and listen to traumatic memory. While the listener of traumatic memory must "listen to and hear the silence, speaking mutely both in silence and in speech, both from behind and from within the speech. He or she must recognize, acknowledge and address that silence, even if it simply means respect – and knowing how to wait" (Felman and Laub 1991, p. 58). Similarly, the 'non-speakingness' of the subaltern, the "refusal to answer or submit to the gaze and questioning" of the international lawyer has to be recognized as forms of resistance and agency (Kapoor 2008, p. 120). Accepting and enduring silence thus seems to be characteristic of both theoretical approaches.

This implies the necessity of enduring silence instead of silencing through representation, it means that one sometimes has to refrain from knowing and speaking in order to learn to listen. By being sensitive to silences, traces of one's own silencing ideology can be revealed and reflected in the process of representation. Taking silence seriously implies that listening embraces the refusal to foreclose stories through legal or historical 'facts'. Sometimes, what cannot be said within the legal episteme of listening, is nevertheless extremely loud. One powerful example of this is the fainting of K-Zetnik in the Eichmann trial discussed in the first chapter. He exemplifies the limits of the legal episteme in grasping trauma exactly through his failure to communicate, and in so doing he disrupts the smooth progression to closure through legal means (Felman 2002, p. 145). His collapse can be seen as a trace of the (im)possible search for truth, as a "closure and totalization of the evidence and of its meaning" about traumatic violence (Ibid., p. 151). The silencing effect of the foreclosure through legal knowledge and the resisting potential and respective alternative knowledge can only be detected by listening to that which is not said. Laub elaborates on a certain knowledge within silence which he contrasts to historical knowledge through facts, drawing on a case of a women testifying about

the upheaval in Auschwitz-Birkenau. According to him, listening to the silence involves respecting the constraints and boundaries of the own knowledge in order to listen to, “what the woman did know in a way that none of us did – what she come to testify about” (Felman and Laub 1991, p. 61). Only through listening to her silence and accepting one’s own limitations, her knowledge could be heard.

“She was testifying not simply to empirical historical facts, but to the very secret of survival and of resistance to extermination. The historians could not hear, I thought, the way in which her silence itself was part of her testimony an essential part of historical truth she was precisely bearing witness to.” (Ibid., p. 62)

The capability of listening embraces the openness to unlearn, had the historians “unlearned history” they would have heard the dimension of the testimony represented in the silent part.

Learning to *speak to* and *learn from* within a post-colonial setting is likewise described as necessarily entailing the *un-learning* of own privileges and certainties. Learning to learn to listen,

“is refraining from always thinking that the Third World is ‘in trouble’ and that I have solutions; it is resisting the temptation of projecting myself or my world onto the Other. Spivak cautions for instance, against assuming that such concepts as ‘nation’, ‘democracy’, or ‘participation’ are neutral, good, or uncontestable. To impose them unproblematically in the field is to forget that they were ‘written elsewhere, in the social formations of Western Europe’ Unlearning means stopping oneself from always wanting to correct, teach, theorize, develop, colonize, appropriate, use, record, inscribe, enlighten: ‘the impetus to always be the speaker and speak in all situations must be seen for what it is: a desire for mastery and domination’” (Kapoor 2008, pp. 116–117)

Combining this with the trauma theoretical conceptualization of listening, listening requires refraining from imposing the very same symbolic order that was scattered by the traumatic experience, one has to refrain from trying to close the gap left by trauma and instead acknowledge the own embeddedness within this symbolic order and accept the lack at its centre.

Accepting the lack at the centre – or the impossibilities of closure would render the listener more humble, because notions of ‘nation’, ‘democracy’ and ‘participation’ are revealed to be incomplete, always lacking and the inherent violence maintaining the order is exposed.

In fact, “listening to survivors’ stories, is, [...] “an experience in un-learning; both parties are forced into a Dantean gesture of abandoning all safe props as they enter, and without benefit of vigil, make their uneasy way through its vague domain.” (Brison 1999, p. 49 citing Lawrence Langer)

Accordingly, the listener to traumatic memory from the global South has to be open to be fundamentally confused, bewildered, injured when listening to the traumatic memory. And instead of claiming to cure the victim and thereby close the gap, a space is needed for these feelings, without always already knowing how to answer.

“The relation of the victim to the event of the trauma, therefore, impacts on the relation of the listener to it, and the latter comes to feel the bewilderment, injury, confusion, dread and conflicts that the trauma victim feels.” (Felman and Laub 1991, pp. 57–58)

Putting this trauma narrative into a linear and manageable form neglects this bewilderment and confusion, which will always haunt the narrative. As an ethic claim, the bewilderment and confusion confronting international criminal proceedings with their own (im)possibilities should be taken seriously and not excluded by referring it to the emotional others. One has to be aware that “the surface is never an adequate explanation, but is rather to be interpreted in terms of gaps, symptoms, slips, repetitions and other indications of repression or unconscious cause.” (Goodrich 1995, pp. 184–185) For my analysis of the practice of victim participation and representation this implies that the encounter of the ICC - represented by legal representatives, staff, judges, prosecutors, defence attorneys etc. with the traumatic memory of the participating victims always causes silence, bewilderment and confusion - emotions. The (un)bearable silences when listening to traumatic memory have to be felt and described.

4.1. Structuring of speaking and hearing

I have to trace the silences caused by the traumatic memory within the practices of participation and representation. This means that within the reconstruction of the relations of speaking and hearing I have to be mindful of the silences and the possibilities of listening within the practice. In order to detect the silences, one has to distinguish between silences and silencing as described above. Within the criminal

legal episteme, emotions are silenced, therefore I have to ask where the excluded emotionality is negotiated within the practice? Where is bewilderment, confusion, injury and dread silenced?

In contrast to this, the silences described as bearing a resisting potential within post-colonial symbolic order are those moments, where the subjects resist to “answer or submit to the gaze” - the legal requirements - asked of them to uphold the binary images (Kapoor 2008, p. 217). Within the practice of participation and representation this implies to be sensitive to the silences of those who are supposed to assume a certain subject position within the organization. Where they refuse to speak what is being heard. This silence can be a literal silence, but it can also be that which is not heard and irritates the subject-positions foreseen within the practice.

4.2. Ghosts

“To urge a troubling of the closures and sometimes pities of identity politics, standpoint theories and experienced based knowledge and the backlash against identity politics is not to try to close this openness but to keep us moving in order to produce and learn from ruptures, failures, breaks, refusals.” (Lather 2008, p. 223)

Underlying the ethical implication of the above described conceptions is the idea, that closure is not only not possible, but that it is from the gaps, within the lack and through the excess that fixed identities and images can be irritated and thereby they keep on moving. The ghosts within the texts of law defer meaning and inscribe contingency. Like the silences described within the section of enduring silences – the refusals to submit to the legal gaze – it is within the legal texts that the surplus and lack surfaces. The always failing legal representations leave traces within the texts. The constructions of truth and justice as achievable and the subject as autonomous and rational relies on the exclusion of that which is not true, not just and not autonomous and rational. Legal decisions – fresh judgements - then bear the marks of their suppressed others.

I have to be attentive to the slips, gaps, ruptures of the legitimizing narratives of victim participation at the ICC. Where do the ghosts of the narratives of truth and justice and healing through participation shine through within the neat legal

framework seeking for closure? Where can an excess, or lack of symbolization be detected and how is it filled again?

Consequently, a critical analysis of the practice of victim participation has to strive for the openness within and look for the gaps within the representational practices implied in the legal, textual and narrative framework of victim participation at the ICC. And at the same time, in describing the gaps – producing a narrative from the gaps – new ghosts will haunt the research which produces its own gaps.

5. Reconstructing the representational framework through organizational ethnography

The questions directing my empirical analysis, derived from the ethical implications of my theoretical approach, were:

- How is the relationship of speaking and hearing framed within the practice of victim participation and representation? Who speaks for/on behalf of/about whom?
- How is the image of *the victim* represented? What is the subject position from which the participating people can be heard at the ICC?
- How does the image of *the victim* drawn within the practice relate to the image of the ICC's self-description? Where are the emotions associated with victims located within the practice of representation? Where is a space for listening?
- Which silences are produced? Where are the gaps within the legal, textual and narrative framework of victim participation at the ICC. How does the lack at the centre of the representation of the victim subject manifest within the practice?

In order to approach these questions, I chose organizational ethnography. Through organizational ethnography, the relationships between different subjectivities within a specific organizational process can be analysed and the particular form of organizational interaction in specific contexts can be taken into account. Looking beyond the “official texts” of an organization, the hierarchical relations can be analysed and contestations of the hierarchy within the organization addressed. The analysis of the legal framework of participation and representation as

it is foreseen within the Rome Statute (RS) and the Rules of Procedure and Evidence (RPEs) and developed in the jurisprudence can be thickened by describing the interrelated practical implications within the court. The “behind the scenes” organization and implementation of the legal framework and its implications for the framing of the relationship of the participating victims to the court can be analysed. Through organizational ethnography the “official framework” of speaking and hearing can be scrutinized from within. One can

“describe various aspects of organizational life: organizational actors’ sensemaking practices across different situations, engaging with what people do and what they say they do; routine patterns as well as dynamic processes of organizing frontstage appearances and backstage activities;” (Ybema et al. 2009, p. 6)

As forecasted in the first chapter the legal and non-legal struggles at the courts, implying the ICC often lead to the further representation, collectivisation and externalization of victims, while upholding the legitimizing narratives of truth and justice for victims. Describing these internal struggles is crucial to understand the problematic of the discrepancy between legitimizing narratives and the organizational practice. Against the backdrop of my theoretical assumptions, understanding the implications of speaking and the possibility of being heard - the representational framework of truth and justice - is essential to understand the contradiction between the noble goals and the disenchanting practice. Through organizational ethnography, the concrete organizational framework of representation, of speaking and hearing to traumatic memory can be reconstructed in order to then analyse spaces of irritation - spaces where the legal striving for closure is disturbed.

“Such ethnographies describe tensions and discrepancies between official pronouncements and unofficial practices, formal design and informal wheeling and dealing, front regions and back regions, what people do and what people say about what they do, the managed and the ‘unmanaged’ organization...” (Ibid., p. 8)

These irritations are not only, and probably not mainly, represented within the official legal texts produced, but can be sensed and experienced when working within the organization together with the concerned representatives and the participating victims. Above that, while relationships of representation are officially framed through the legal decisions, the personal encounters cannot be represented in the legal texts, because legal texts attempt to eliminate the personal in order to appear

objective. The effects of encounters with the representatives of traumatic memory therefore have to be experienced to be described. When, as developed in the first chapters, the victim is represented as the emotional other threatening to overburden the proceedings in the narratives about international courts, emotions, feeling and sensing play a crucial role to grasp the tensions. This dimension of representation can only be researched through experience and talking to the involved professionals. Therefore, the triangulation of methods characteristic for organizational ethnography, participant observation, interviewing and document analysis, and the thick description (Humphrey and Watson 2009, p. 41) approach to understand an organization seemed especially fitting for my project.

“As is commonly done, we characterize ethnographic methods in organizational settings as the combined field research ‘tools’ of observing (with whatever degree of participation), conversing (including formal interviewing), and the close reading of documentary sources. These methods rest upon action (‘talking, laughing, working, doing’) and proactive perception (‘observing, listening, reading, smelling’).” (Ybema et al. 2009, p. 6)

5.1. Participant observation

Within the range of methods used by organizational ethnographers, probably participant observation is regarded as the central mode of creating knowledge about an organization. As a matter of fact, this is the method that is distinctive about ethnography. But also in sociology, participant observation, with the focus on participation rather than observation, as enacted ethnography is propagated as a more holistic approach to gain knowledge (Waquant 2014). The appropriation of empathy by using the whole researcher as a skilled and sensitive research tool is said to better reflect the invisible dimensions of action, structure and knowledge and its interrelatedness and mutual constitution (Ibid., p. 97). This approach also somewhat blurs the theory-practice gap and the legitimizing rationality/emotionality dichotomy: “Researcher’s lived bodies come not only with minds (which are often privileged above all else in academia (and in law A/N) but with spirits, emotions, and whole lives.” (Taber 2012, p. 77)

And, “[B]y reclaiming “contamination” as an organic process of knowledge production grounded in (not abstracted from) human experiences,

auto/ethnographers resist those who seek to clean up, or confine the mess rather than revealing it.” (Ibid.)

For my participant observation, I worked three months at a human rights NGO at Kenya and three months at the OPCV at the ICC in the Netherlands. At Nairobi, I worked with Kituo Cha Sheria. According to its self-description:

“Kituo Cha Sheria (Kituo) is a human rights non-governmental organization committed to helping the disadvantaged, poor and marginalized people in Kenya access justice. Kituo is largely supported by development partners but the organization also received support across the country from volunteer advocates, in terms of their professional services and paralegals operating from established community and prison justice centers.”¹⁴⁴

I got to know Kito Cha Sheria because I worked at a stakeholders workshop, „The Dynamics of Kenya’s Election Process“, in Berlin, with Kenyan and German guests in cooperation with FriEnt, Institute for Development and Peace (INEF), discussing the risk of violence occurring in Kenya following the elections of 2013. On this workshop I met several representatives from local NGOs and INGOs, among others the project coordinator of the GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit) in Kenya. She organized the contact to Kituo’s Peace, Justice and Reconciliation Programme. Given my experiences in international criminal law and the master in peace and conflict studies, they decided to have me as an intern. I worked in a team comprising a German development worker, my boss (a sociologist), and a colleague (lawyer). The main work of Kituo is pro bono legal aid. The Peace, Justice and Reconciliation Programme was created to work with victims of post-election violence, most of which were internally displaced persons. The programme was relatively independent from the rest of the organization. Nevertheless, we were located at the main offices in Nairobi, together with the other colleagues. Most of the other co-workers were lawyers. Given that the programme dealt with all transitional justice mechanisms established in Kenya over a long period, my colleagues could put the work of the ICC into perspective within the country. Kituo worked closely with the VPRS of the ICC and a former staff member of the Peace, Justice and Reconciliation Programme worked as an assistant for one of the legal representatives representing victims at the ICC. For my research, it was

¹⁴⁴ <https://kituochasheria.or.ke/>, last accessed 21.01.2018.

important to work for a local NGO that represents the context of the ICC within the situation countries. They submitted amicus curiae in the proceedings and have an overview and an insight over the societal struggles around the ICC that are more independent than the insight view an ICC organ would have. What is more important, they also worked with victim communities that did not fall within the scope of the cases which meant that I met people who were “left out” of the process and people who were included. An aspect that became clear, while I was in Nairobi was, that because I was not directly affiliated with organs of the ICC, I was far more flexible. Since the security provisions did not apply to me, I did not have to ask for clearance to go to certain areas. Especially for my interviews with spokespersons of victim communities this was very helpful. To exemplify this, in a meeting with a representative of the VPRS my colleague asked her: “How is it on the other side?”¹⁴⁵ referring to the fence surrounding their offices. Despite the fact that Kituo is not an organ of the ICC, I considered them to be part of the organization of victim participation at the ICC. Local NGOs and INGOs play a central role as an *in between* of the court and the affected communities and are relied upon by the ICC organs to establish contact with the communities. After my stay in Kenya, I interned at the OPCV. According to its self-description:

“Within the Court, the Office of Public Counsel for the Victims (OPCV) provides legal representation to victims throughout proceedings, as well as assistance and support to external lawyers appointed by victims. The OPCV is an independent office and falls within the Registry solely for administrative purposes. This independence is a prerequisite for carrying out the mandate of assisting and representing legal representatives of victims and victims. Such independence allows the Office to work without being subjected to pressure of any kind and preserves the privileged relationship between victims and their lawyers. The Office has also an important role in enhancing the rights of victims in the proceedings, advocating at different levels and participating in specialised meetings with subsidiary bodies of the Assembly of States Parties and NGOs.”¹⁴⁶

I opted for an internship at the OPCV instead of the visiting professionals programme, because, from my experiences at the ICTY, I knew that interns are involved in day to day work practice. Therefore, I officially applied for the internship programme and was accepted. Interning at the OPCV at The Hague provided me with an insight into the internal cooperation of the organs of the court and the work

¹⁴⁵ Field notes, 9/1/2014.

¹⁴⁶ <https://www.icc-cpi.int/about/victims>, last accessed 23.01.2018.

atmosphere at the court whereas at the same time working for an officially independent office. Furthermore, the OPCV is responsible to provide assistance to external legal representatives while at the same time, they represent participating victims. Therefore, I had an insight into both modes of representation.

During both stays, in Nairobi and The Hague, I did observant participation rather than participant observation since the focus was not so much my observation, but my participation. My first day at Kituo was a strategy meeting, planning the activities for the upcoming months. Therefore, my work was integrated into the programme. I drafted legal opinions on the IDP Act recently issued and on the application of the right to truth and justice to the parliaments decisions to censor certain parts of the report of the truth commission. A short version of which was published in a local newspaper. Above that, I got access to policy papers planning an International Crimes Division at the High Court of Kenya and I attended meetings with other NGOs and INGOs working in the field. For my research, a meeting with a representative from the VPRS and the Truth, Justice and Reconciliation Commission, were especially insightful. Above that, I visited justice centres, the office in Mombasa and talked to so called spokespersons of victim communities in order to update them on Kituo's work and plans.

At The Hague I was more engaged in legal research than in the actual legal representation. The insights concerning the representation were mostly received through conversations with my colleagues on the floors and during lunch-time. Also, everybody was very open to the fact that I was doing research on their work and they were very willing to contribute. I got insight into the ReVision project aimed at reforming the registry at the ICC and the general reservations among the staff. Participated in team-meetings and at the end of my stay I was asked to help with a statistical evaluation of the application form answers, for a planned publication of the OPCV.

The "access to the field" was facilitated by my background in International Criminal Law and my previous experiences at the International Criminal Tribunal for the Former Yugoslavia (ICTY). I was considered one of the international criminal law crowd living and working at The Hague, since interning often is the starting point for a job at one of the courts.

Through practically participating by working in the field of victim participation with other practitioners, the research subject to some extent remains a subject not turning to a pure research object (Winter 2014, p. 249). My colleagues were partners in dialogue rather than merely being explored. Since I consider myself in a way as one of them, my ethic concerns related to “doing research about them” are lowered, though not eliminated completely, because I am still also radically criticising. I hope this critique will be understood by those criticized as a constructive engagement with a practice that I was equally involved in and a critique of the structures rather than personalized critique of an individual practicing. Here I agree with Taber who describes the standpoint as a former member of an organization that one now critiques as an often contradictory standpoint that is nevertheless grounding the research and allows one to explore the institution from both ‘insider’ and ‘outsider’ perspectives (Taber 2012, p. 75). While I would like to add, that the positionality is always at the same time in – and outside, and it is sometimes difficult to clearly locate oneself. This furthermore shows that whether you are an insider, or outsider is most often not a matter of choice, because those you work with decide whether they “let you in or leave you out” as a researcher/as a lawyer/as a social/political scientist/as a white, female etc., and they permanently decide anew.

At The Hague I was considered as an interested intern who had some experiences “in the field” which I felt was appreciated. Whenever I told my colleagues about my experiences in Kenya, they could connect their experiences. I had the impression that they mostly shared my critical stance on the marginalization of victims while remaining a little sceptical about the legal criticism.

At Nairobi the disciplinary background did not matter that much, because my boss was a sociologist and she embraced my critical approach. There my positionality as a white researcher/lawyer from Europe was more decisive for the decisions to in – or exclude me; to accept me as an in – or outsider.¹⁴⁷ While I still remained a muzungu, I felt that working together was functioning quite well despite my ignorance in some aspects. It helped that I shared an office with a colleague in the

¹⁴⁷ This positionality is in a way more complex since I could not identify as either white researcher/lawyer etc, I was always already identified as white and this implied a certain positionality outside. And due to language barriers and other deficiencies, I think it was not always a deliberate choice to exclude me, but a necessity due to my incompetency.

middle of the building where everyone had to pass through and that everyone had lunch together. And throughout my research, I felt included, though there were situations, both in Nairobi and at The Hague where I was left outside. Above this, for myself, this insider/outsider positionality also served as a defence mechanism since it allowed to distance myself from the matter in question, switching the position and disciplinary background and looking from the outside.

Against the backdrop of the twofold role of self-reflexivity within my work, I tried to maintain a high sensitivity towards my thoughts and feelings, especially these defence-mechanisms, while working. Observation in this sense cannot, and can never be reduced to observing, seeing, and listening to what happens, but it is also being aware of what causes me to see and listen to particular scenes, and when I decide to not listen or see. Being aware of how I felt in re-presenting victims, is especially important with regard to the trauma theoretical background. Feeling when my own defence mechanisms set in, why and how. In general, this requires the openness to potentially irritating situations and encounters. (Ploder 2009) Many of these encounters and situations will not be represented in this work, they nevertheless were absolutely crucial for me to understand, and make sense of victim participation and representation at the ICC. One could probably say that the own experiences, feelings and defence mechanisms formed part of the tacit knowledge underlying the interpretation of the analysed texts.

5.2. Interviews

During my stay in Kenya and The Hague, I conducted 25 semi-structured interviews, most of them with legal representatives of victims and/or NGO staff working in the field, in Kenya and at the ICC. Eight interviews were conducted with people who considered themselves victims and representatives of victims who were themselves victims. Not all of the latter were participating in the proceedings at the ICC – but so called “situation-victims”. My aim was to track the “translation” process, the epistemic violence of the language used and the practical exclusions within the institution of victim participation. I do not intend to portray, or represent, the victim’s understanding of truth and justice. I analyse the truth and justice produced in the process of translation and representation and reflect its legitimizing function. Therefore, it was not necessarily important to cover as many accepted case-

victims as possible, but to get an impression on how to establish contact with victims' communities and individuals, how conducting interviews is organized and how the affected people relate to the process and the concepts of truth and justice as propagated for by the ICC. Furthermore, as will become clear in the following chapters, often representatives were asked to represent victim's views in a general way, meaning to include the interests of all victims - registered as participants, or not. This was especially the case in the Kenyan cases. Therefore, the people I spoke to were representative of the participating victims and of those whose interests should be represented in a general way.

Among the representatives I interviewed were legal representatives from the OPCV, an external legal representative in the Darfur, Sudan and the Kenyan situation and a staff member of the external legal representatives in different cases. I will keep the identities of my interviewees anonymous and only refer to them by their function, since their names are not important to understand their positions. Before the interviews I informed the interviewees about my dissertation project and they all agreed to participate.

I developed two different set of possible questions, one for representatives and one for victims/victim representatives. But since the interview settings differed significantly from meeting in a café in Kisumu to sitting in the cafeteria at the Arc building of the ICC. From meeting with women in a community centre in Kibera and talking to them with open doors, to meeting a lawyer in his office, adhering to the questions was not my primary objective. Furthermore, some interviews were done with up to three persons at a time. I rather tried to develop a sense for the situation and atmosphere and to follow the lead of the respondent, asking follow-up questions that might derive from the set of questions prepared. The questions and changes are as comprehensive as possible reflected in my research diary – my field notes.

The questions for the representatives were basically structured in two sections, the first was, what I referred to as “more organizational” questions, asking about who is responsible for what and how the process of translation and representation is framed from the participating victims to The Hague. The purpose of this set of questions was to reconstruct the framework and organization of speaking and hearing from the

perspectives of the representatives. I also openly asked them if they sometimes felt that something gets lost in translation/representation, if there was something that they would like to get across to the judges and others, but they do not manage, or if they developed strategies to represent “the unrepresentable”. The second part was, what I termed “more personal” questions, I intended to bring the interviewees to reflect on their role as representatives, their motivations etc.

The set of questions for people who considered themselves to be victims was also divided into two sections – but here I remained more open to listen to what they choose to tell me about them being victims/survivors/internally displaced persons etc. what it means to them and how they relate to the transitional justice processes established within Kenya. Then I asked about their perception of the ICC and the possibility of victim participation, what they expect from legal justice and what truth means to them. In these interviews I tried to remain as open as possible for my own silencing, the silences of my interviewees and the irritating potential of difference. Generally, the interview situations were more unpredictable and therefore the whole procedure of asking and answering (who was asking, who was answering – who expected what from whom) was not as clear as it was with representatives, or this is what I thought. I soon had to realize that flexibility and openness was key to listening. And that I have to accept that I am “just another mzungu asking questions”, which I first felt to be offending. But with the time, I realized that this is an expression of my privileged position. We (the westernized, in my case white, elite representing the court, INGOs, or NGOs) can treat them as representatives of *the victims* and generalize their interests, they do the same, but this irritates the image, since it is not reflective of the self-description of someone who delivers truth and justice and enables story telling. I reflected these feelings in my research diary and they caused me to refine my theoretical approach. The openness sometimes overwhelmed me, either I got angry, sad or I was just helpless, which then reminded me of my noble theories again, of the radical relationality and the related feelings this might cause. But these were exactly the moments that are crucial to my interpretation of all texts produced within the practice of participation, because these are emotions caused by encounters.

The interviews lasted anywhere between 30 minutes up to two hours, which provided extensive transcription material. Before systematically analysing my empirical data, I had to decide how to best transcribe the collected material. Some of the interviews were not recorded, because I felt uncomfortable and the situation felt not appropriate. These notes are literally transcribed from my field notes and do not comprise pauses, laughter etc. They are complemented by notes about the location of the interview and my impressions before, during and after the interview. The recorded interviews were also transcribed literally because I considered it unnecessary to reflect slang, accent or the like. Given my theoretical background and the insights of trauma theory, I considered it important to include pauses and silence. Again, I took notes to cover the context of the interview. Commonly it is assumed that the issue under consideration in interviews is not the interview itself, but the thematic of the interview. In most of my interviews it was also the interview itself – the situation, context, feelings and how it came about. As mentioned above, this then is reflected in my field notes, which is reflective of the circumstances and my impressions and interpretations.

The field notes already reflect one step of interpretation against the backdrop of my considerations of what could be important – criteria were: Access, language, surroundings and atmosphere – in general, aspects that appeared notable to me in this special situation with regard to my broad research interest – how are the victim's stories translated and represented through the different intermediaries and representatives into the legally authorized story at The Hague. Therefore, I was sensitive to what caught my attention and what not – and why. How is the overall atmosphere influencing my attention. How are the questions relevant to the court influencing what is being answered – what else could there have been told.

5.3. Document analysis

In order to analyse the legal framework of victim participation, I analysed documents and doctrine, but also selected transcripts of the proceedings, and the online presentation. This data helps to understand the organizational framework, they are textual communicative practices in which organizations constitute “reality” and the forms of knowledge appropriate of it (Coffey 2014, p. 369).

“Social Actors who write and read documents bring to bear their knowledge – often tacit – of the conventions that go into their production and reception. They develop and display a working knowledge of the registers of their professions, organizational setting and cultural activity.” (Ibid., p. 372)

Furthermore, organizational and professional texts bear a particular responsibility in ignoring and invalidating difference. Smith argues that,

“texts shape social relations which flow from such documents.... Texts shape social relations, including the delivery of services, to be consistent with dominant ideologies, thereby excluding issues related to race, economic status, gender, sexual orientation and other differences from discourse.” (J O’Neill 2015, p. 132)

This is particularly the case with legal texts that appeal to a rationality, sobriety and neutrality and thereby obscure all irrationality, emotionality and partiality and constitute subjects as preceding the texts that are actually always also subjectivized through the text in relation to the court.¹⁴⁸

Accordingly, the documents I analysed are the basic legal texts in the context of victim participation. As an entry point of participation, the application forms for people who apply to be recognized as a victim participating in the proceedings at the ICC and/or applying for reparations. The decisions on said applications and the decisions by the different Chambers on victim participation – defining victim’s interest, ruling on a set of procedural rights and the mode of representation. Taken all together, I analysed the jurisprudence concerning victim participation and representation. Furthermore, I analysed submissions by legal representatives, sporadically the defence and the prosecution. Also, manuals for victim representatives and NGO reports make up the corpus of documents I analysed.

Despite the fact that I studies the Kenyan case in more detail in my participatory observation, I analysed legal documents framing the legal practice of victim participation and representation from all cases at the ICC so far. The practice of victim participation and representation took shape over the time, from the very beginnings in the decisions on victim participation in the situations of the DRC and Uganda until the latest decisions in the Ongwen case. Since I intend to reconstruct and analyse the practice as it developed, the focus had to go beyond the Kenyan

¹⁴⁸ Buckel (2007), see also the elaborations on the subject position provided for victims in the application forms Chapter 5 1.1.

cases. Therefore, I analysed all central decisions and submissions on victim participation in the different situations (Democratic Republic of Congo, Uganda, Central African Republic, Darfur, Sudan, Kenya, Côte d'Ivoire, Mali) and the respective cases (The Prosecutor v. Lubanga, Katanga, Ntaganda, Bemba, Gbagbo and Blé Goude, Abu Garda, Banda, Kenyatta, Ruto and Sang).

Apart from that, the number of documents produced by the court and its organs is enormous and not manageable in the context of this research project. Selectively, in order to trace some proceedings, I included transcripts from proceedings in my analysis. This was particularly relevant when analysing the presentation of views and concerns and testimony in person. In order to reconstruct the self-legitimizing practices, it is very insightful to analyse the online presentation of the ICC (which changed considerably in the last months) and some selected videos on the ICC you tube channel explicating victim participation, the courts mandate etc. It goes without saying that legal texts and the self-presentation on you tube follow different narrative structures and linguistic registers (Coffey 2014, p. 371). Especially legal documents, such as a decision or a submission has a special function within the proceedings and applies a specialised legal language, also these documents are interrelated, they refer to each other and thereby create a distinct legal meaning.

5.4. Data analysis

Strictly defined, my set of data consists of field-notes containing my observations and impressions during participant observation, recordings and transcripts of semi-structured interviews and documents. In the context of organizational ethnography, this strict distinction is inadequate to reflect the basis of the analysis. Field-work, desk-work and text-work are interrelated. Ethnographic knowledge is always 'generated' in research, rather than as data being collected' or even accessed' and analysed afterwards (Ybema et al. 2009). "Data analysis is not a discrete and separate stage of the research process but rather ongoing throughout and beyond the life time of a project." (Mauthner and Doucet 2003, p. 425)

For example, while one can say that I analysed data in the form of field-notes, observations, interviews and documents there is no clear distinction between the different methods used. Interviewing in institutional ethnography can be described as

“talking with people” and is understood within a wide range of data, only one of which is planned interviews, pinning together a larger picture. Interviews are less structured and more collaborative in this context (Devault 2012, p. 384). Interviews are consequently also contained in my field-notes and observations. And of course, the knowledge contained in documents is ever present and constantly actualized in the process of participant observation. Partly because I worked with the documents, thereby permanently interpreting and analysing them, which cannot be distinguished from my later textual analysis. This combination and overlapping is what constitutes organizations and therefore appreciating the complexity involves a combination of methods and the acknowledgement that analysis is an ever-ongoing process. Especially the notion of the distant observer is blurred when participant observation is working in the field instead of just following and observing the processes.¹⁴⁹ In this sense: “Rather than seeking to eliminate the “messiness” of real experience by defining and quantifying it, I embraced the mess as a source of meaning...” (Ellingson 1998, p. 511)

This is how I came to the interpretation and representation of the data collected, it was a constant back and forth through the texts, be it interviews, legal texts or theoretical elaborations. I found patterns, and followed them through the texts, wondered about what these patterns include, and what they exclude and how they changed (like the notion of *the victim* – *the victims* – the *relevant victim*). According to the patterns, I coded and mapped the data. Then I scrutinized my patterns, re-reading the texts, I sorted out patterns and found new ones. Here I realized that the intensity of the perception of gaps and impossibilities seemed to depend on the proximity to victims. This caused me to be more sensitive about the deferrals in meaning and representation also in my own writings, the closer I got to the actual participating victims. I found repetitions that seemed like mantras and searched the texts for explanations of these repetitions and interruptions and challenges of the mantras. The most striking mantra that occurs throughout the data, the academic texts included, is that participation has to be *meaningful and effective*. I started to wonder about the meaning of meaningful and effective and the function of the repetition. Generally, I tried to wonder and question as much as I could, already during the

¹⁴⁹ If this clear distance is ever really possible does not have to be discussed here.

collection of my data, I wondered about me wondering, but I also tried to be open to what seemed all too natural to me, issues I did not wonder about. Wondering in this sense means especially questioning the taken for granted, try to wonder about the themes no one is puzzled by and question the seemingly natural.

The theoretical conceptions and questions guided the search for patterns and lead my attention while analysing. Through the close reading of the texts produced, a narrative evolved. The structure of this dissertation developed with the impression that the legal pre-texts of participation are strongly determining the practice and framework within which the people had to work. The realization still developed while writing. From then on I decided to take the legal basis as a starting point to reconstruct the representational practices of speaking and hearing. Drawing on the theoretical thought of legal decisions as fresh judgements, I analysed the jurisprudence accordingly. And in a last step, the personal perceptions, reflected in my field notes, memories and the interviews were analysed against the backdrop of this legal framework. This structure was also influenced by the proximity-distance complex. The legal texts always invoke a certain objective distance, this is also constitutive of the working atmosphere at The Hague, which is not only geographically more distant to the participating persons. This distance renders it easier to theorise and conceptualise - it was easier to find patterns, because legal reasoning relies on rules and patterns of its interpretation. Beside this, the messiness of everyday work, work-relations and the complexity of problems one faces when working more proximate to the affected communities is more difficult to systematize according to scientific requirements. Therefore, in order to make sense of my texts, I started with the legal texts which formed the starting point to analyse the other data. I am aware that this might once again be a privileging of the allegedly more distant view - which is also associated with rationality and neutrality. But I hope that through highlighting the importance of proximity, which is represented towards the end of this dissertation and the interrelatedness of distance and proximity; rationality and emotionality etc. I can show that distance is an illusion always relying on proximity, both in legal proceedings and in research

No analysis can prevent the fact that in one or the other way the results are influenced by what one was looking for in the first place and others might have put

different foci and certainly would have made different experiences and have different impressions. I hope that by rendering my train of thoughts as transparent as possible, my interpretation can be put into context. In the course of the analysis, it became very clear to me, that I want to provide an alternative narrative of victim participation and I hope that the following description and interpretation of the representational practices, the irritations and efforts to close gaps and the respective subjectivities will vivify a different reading of what is taken for granted within the organization of victim participation. I intend to raise troubling questions, questioning the innocence of victim participation at the ICC, this intention guided the analysis of my data and my approach to the practice of the law;

“[t]owards a science (law A/N) based less on knowledge (truth/facts A/N) than on an awareness of epistemic limits where constitutive unknowingness becomes an ethical resource and aporetic suspension becomes an ethical practice of undecidability...Such a stance raises troubling questions about how we think about how we think and learning to learn differently, where ‘giving a voice’, ‘dialogue’ ‘telling and testifying’, and ‘empowerment’ have lost their innocence.”¹⁵⁰

6. Limitations

In fixing the unsaid and unheard of victim participation, I am constantly silencing through my own writing. My writing is just not a re-presentation of the “reality” of victim participation, but rather always already a positioned re-production of this reality. Therefore, my personal presuppositions, be it theoretical or otherwise play a crucial role in the perception, collection, interpretation and representation of my data. And, the social inherent in all human interaction exceeds the words I can possibly find to describe said interactions. Using qualitative methodology and methods against the backdrop of my theory is, just like victim representation, a work “with no guarantees” (Spivak 2001, p. 15). In my work, reflexivity therefore plays a twofold role, firstly, as described, a heightened self-reflexivity is required when using deconstructive inquiry and post-colonial approaches. Secondly, like elaborated in the previous sections, self-reflexivity is essential to the ethics of listening and representation. Therefore, beyond reflecting on my role as a researcher, one question

¹⁵⁰ Lather (2008, p. 227); explicitly referring to Spivaks notion of unlearning privileges and learning to learn from below, and what I refined in the encounter with traumatic memory as ethical listening.

leading my inquiry was to find spaces of self-reflexion and narratives that closed these spaces again. I constantly tried to ask myself:

“What are the ethico-political implications of our representations for the Third World, and especially for the subaltern groups that preoccupy a good part of our work? To what extent do our depictions and actions marginalize or silence these groups and mask our own complicities? What social and institutional power relationships do these representations, even those aimed at ‘empowerment’ set up or neglect? At to what extent can we attenuate these pitfalls?” (Kapoor 2008, p. 91)

Furthermore, against the backdrop of my theory, irritations resulting from the confrontation with the lack and excess of the desire of closure are taken seriously in order to reveal potential for ethical encounters. (Denzin and Lincoln 2008) Of course, I am, through doing research already implicated in these violent entanglements, nevertheless I hope that through the “re-turning of the gaze” I can reveal some of the epistemic violence reflected in the practice of victim participation through instead of observing the other – observe the Western self in its relation to the alleged other. The reflection on different aspects of my methods and the data can only be sporadic and temporal. And, as Mauthner and Doucet note, time has to pass before one can understand and articulate how the research was shaped and by which pre-suppositions (Mauthner and Doucet 2003, p. 425). I want to discuss one aspects that troubled me throughout my research and to which I did not find a satisfying answer or place within this work.

7. My representations of *the victims participating in the proceedings*

Throughout my writing I was unsure which term I should use referring to the multiple subjectivities of those people who are participating in the proceedings at the ICC as victims. Within my writing this manifested in a twofold way:

Firstly, in order to emphasise the heterogeneity of persons behind the label - *the victims* I also referred to the term individual - individuals - individuality, this is of course undermining my theoretical argument that subjects are not autonomous individuals. Still I consider the term to be, on the one hand reflective of the symbolic order I am situated in - referring to individuality in contrast to collectivity and, on the other hand, it is used to contrast it to the legal approach taken which, while

pretending to individuality is collectivising *the victims* in the process of representation. A more complex and reflective conception of the subject as developed by Lacan helps to understand the function of these terms within the symbolic order wherein I am subjectivized just like my related others.

Secondly, and more importantly, my own terms- the participating victims, *the victim*, *the group of victims*, *the victims*, *the relevant victim* - felt as inadequate as the general unreflective legal terminology is. Whenever I wanted to refer to those persons behind the representations of *the victims* produced within the legal framework and the practice of the ICC, I referred to victims participating in the proceedings or persons, or individuals participating in the proceedings. This is my representation, which is also reproducing the representation of victims as an inaccessible group. Whenever I knew of the name of a concrete participant, I used the name. When referring to the people I interviewed who were considering themselves as victims of post-election violence, I did not use the names for reasons of security.

The problematic of the term victim is that it stands for passivity and dependence among other attributions. This is why, for some, the term survivor, emphasising the active surviving of violence feels more adequate. When we were talking about the terminology used in our work, my boss in Nairobi told me, that a victim they were representing once told her that as long as she is a displaced person and cannot manage to sustain herself because of the violence that caused her victimhood, the term victim still applies for her. Therefore, she wants to use the term to clarify that nothing has been done to ease her victimhood.¹⁵¹ She did not feel that she survived yet, because life was an ongoing struggle to survive. I do not know if this story was told in order to silence our conscience while still using the term victim, not only for this woman, but for all persons represented. I can only emphasise that the focus of my work is to describe representations not to represent those represented. Doing so, I, at the same time, violently represent and reveal the homogenizing violence. For this reason, I want to clarify, that my words: victims participating in the proceedings represent persons only in their relation to the court. The multiple different and interrelated subjectivities of these people are mainly constituted through other relations than that to the court. I can say nothing about these other relations.

¹⁵¹ Field-notes, 09/01/2014.

Chapter 5: Representation

1. The Legal Framework of Representation

Since the implementation of the legal framework of victim participation and representation was basically left to the discretion of the Chambers, only providing them with the central norm, Article 68 (3) of the Rome Statute (RS), there is ample and diverging jurisprudence on the topic. Each Chamber could decide anew how to design victim participation in the respective proceedings. This resulted in many different approaches being developed to the application systems, to the modes of representation and to the set of procedural rights provided for victim representatives during Pre-Trial and Trial Phase. These different approaches respectively frame who has access to the court through whom, how, and who can say what during which phase. Accordingly, the framework of speaking and being heard is not coherent and differs from case to case, situation to situation. In the following these different approaches will be unfolded, reconstructing the representational practices of speaking and hearing not only with regard to the practical legal provisions, but also with respect to the textual practice - the language used - and the self-understanding of representatives. Starting with the analysis of the different application forms (1.1.) developed through the Chambers and the organization of the first contact of the Court and its representatives to those who want to participate as victims in the proceedings. Thereafter, the organization of legal representation will be described, in which it is determined who is speaking for/on behalf of/about the participating victims in the proceedings. (1.2.) Because of the, above mentioned, discretion of each Chamber, I discuss all approaches developed by the different Chambers in the different cases, taking as a starting point, the relevant norm. Sometimes there is even a variation in the representational framework from Pre-Trial to Trial Phase. In both areas, application and representation, the institutionalization of victim participation at the ICC lead to the further representation, collectivization and externalization.

1.1. The Application Phase

The central norm regulating the general requirement of applications and the transmission of these applications to the respective Chambers is Rule 89 (1) RPE:

„In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber.“

Filling in the application form is the first contact, that people who want to participate in the ICC proceedings as victims officially have with the court. Hence, the application phase is central within the framework of victim participation, for once because, as said, it is the first contact, then of course, because it determines who can participate – who is a victim in the proceedings. And, which is probably less obvious, the application forms are very often referred to as a source of information within the submission of the Legal Representatives of Victims (LRV) and in decisions by the Chambers, it therefore also determines to a certain extent what is being heard at The Hague. Accordingly, in this phase it is being defined who can speak (in principle) and it pre-determines already what can be spoken about – the framing of what is being heard, the former and the latter are interrelated.

1.1.1. The first contact –Who is being reached?

When the Office of the Prosecutor (OTP) opens an investigation, and issues the first warrant of arrest, the Pre-Trial Chambers will often request the Registry, namely the Victim Participation and Representation Section (VPRS)¹⁵², to produce a mapping of victims' communities within the respective situation country and possible intermediaries.¹⁵³ This often goes hand in hand with outreach activities, so called victim education and the training of intermediaries.

The VPRS works closely with international and national NGOs who are already active in the field of human rights, one of which was Kituo Cha Sheria (Kituo). Mainly, the VPRS depends on the beaten paths of the international development and human rights work infrastructure, and the mapping of possible recipients follows similar logics. This is furthermore reflected in the fact, that often international NGOs already present in the situation countries help victims of precedent violence to fill in application forms and provide legal assistance by lawyers. In the Democratic Republic of Congo, the first forms were filled in with the help of the International

¹⁵² The VPRS is the responsible office within the Restristry, established pursuant to Rule 86 (9) ROC

¹⁵³ HUMAN RIGHTS CENTER UC Berkeley School of Law (2015, p. 22).

Federation of Human Rights (FIDH). In the Lubanga case, victims were assisted in finding legal representation by local and international organizations. The same holds true in the situation of Sudan.¹⁵⁴

In Nairobi, I was told that the VPRS and Kituo rely on the same intermediaries¹⁵⁵ when it comes to finding and contacting victims. And a representative from another case told me that she supposes that the trust in the local NGOs is validated by consulting with international NGOs already “in the field”.

“You have NGOs which are affiliated to for instance to international NGOs. And I think that VPRS normally they try to find out if local NGOs are also linked to international NGOs quite known so that they can be trusted more.”¹⁵⁶

For local NGOs the fact that the ICC works with them is perceived as a recognition of their years-long work with victims in the field.¹⁵⁷ The ICC, in its outreach strategy explicitly announces a formal cooperative relationship with partners and intermediaries:

“The development of partnerships is important for reaching the broader local population through culturally appropriate intermediaries, particularly where ICC staff is unable to contact the general public due to lack of resources, logistical or other constraints or security concerns. Developing partnerships will also decentralize the dissemination of information and, by supporting the creation of local initiatives and/or networks, increase the awareness of the general population on Court-related issues.”¹⁵⁸

After it became clear during the Lubanga trial that intermediaries played a crucial role, connecting the Court to the participating victims and that this role is far from

¹⁵⁴ REDRESS; Representing Victims before the ICC: Recommendations on the Legal Representation System, April 2015, p. 5.

<http://www.redress.org/downloads/publications/1504representingvictims.pdf>, last accessed 02/2/2017.

¹⁵⁵ Notes from meeting with VPRS representative, 9/1/2014.

¹⁵⁶ Interview with LRV 16/6/2014, these international NGOs are HRW, AI, and more directly dealing with victims REDRESS; FIDH, VRWG. The Victims' Rights Working Group (VRWG) is a network of over 300 national and international civil society groups and experts created in 1997 under the auspices of the Coalition for the International Criminal Court (CICC). It was created by a number of international NGOs and experts but over the years has evolved to include NGOs from a wide array of countries including those countries most affected by the International Criminal Court (ICC), such as the Central African Republic, the Democratic Republic of Congo, Ivory Coast, Kenya, Libya, Sudan and Uganda. The VRWG is facilitated by REDRESS. The outreach and education programme for victims of post-election violence which was conducted by Kituo was also supported by REDRESS and the GIZ, the German Society for International Cooperation.

¹⁵⁷ Interview with NGO staff, 20/3/2014.

¹⁵⁸ Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 29 September 2006, para. 66.

defined, lacking the necessary transparency, guidelines governing the relation between intermediaries and the Court were released, defining intermediary as:

“An intermediary is someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other.”¹⁵⁹

Within the definition of the ICC intermediaries are all those who are located between the official personnel of the court and those who are to be reached. This could be individuals and organizations. I will further differentiate between the international organizations working with the Court (the most important are joined in the Victims' Rights Working Group VRWG and facilitated by REDRESS¹⁶⁰), and national NGOs like Kituo. Furthermore, there are, more or less, organized spokespersons of victim communities who are in contact with national and international NGOs and facilitate meetings etc. The latter are referred to as intermediaries by the NGOs, while strictly speaking the NGOs themselves are intermediaries for the court. And although the guidelines develop criteria for the selection of intermediaries applied during a screening and foresee training possibilities, my research showed that still a lot of opacity is prevailing in this field. By way of example, no interviewee could answer if s/he knew how the spokespersons were selected within the community and with which authorization s/he spoke for and on behalf of other victims. It was presumed that it is those who are most outspoken, at the same time they were assumed to represent the majority of victims. Those who are most outspoken do not necessarily represent the majority and it was admitted, that there were sometimes fights for supremacy among different spokespersons and that thereafter new groups formed.¹⁶¹ The power dynamics within different groups of victims were not transparent at all. Of course, this also means that the likelihood that persons who are not yet within the realm of recipients of international and national NGOs and their respective spokespersons, who were referred to as gatekeepers to the victim communities by my co-workers, is very low –

¹⁵⁹ Guidelines Governing the Relations between the Court and Intermediaries, March 2014, p. 5. <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf>. Last accessed 26/5/2018.

¹⁶⁰ <http://www.vrwg.org/about-vrwg/organisations-and-affiliates>, last accessed, 21. February 2017.

¹⁶¹ Field Notes, 22/3/2014: Preparation of interviews in Kisii and Kisumu. It has to be mentioned that this applies to spokespersons of internally displaced persons among whom only some were participating in the proceedings.

at this early stage of the proceedings.¹⁶² Also, voices that do not fulfil the criteria of already established NGOs are hardly being represented.¹⁶³ This also applies for persons and organizations who deliberately decide to work beside the official structures.

Regarding the access to possible victim communities before the application process starts, with respect to the question *who speaks* – it is basically the intermediaries from international and national NGOs and spokespersons who are already present in the field of previous human rights and development work who direct the legal staff of the ICC.¹⁶⁴ They are assumed to somehow have been authorized by victims – but this is not verified. This was also reflected in answers given by participating victims:

“That was several years later. The events occurred in 2003, and I suppose that it was in 2006 when the complaints were filed. Some NGOs came, but then they would leave without any follow-up. It was only later that we began to receive other important people, and they had us fill out various forms and that led to the trial what we are at today. Some lawyers who had travelled to the area even asked the victims to organise in the - into various groups to carry out a number of activities, including farming.”¹⁶⁵

Despite the mapping activity, there still seems to be a lot of randomness. In any case, this is also reflected in the perceptions of the participating victims who testified before the Court. When they were being asked how they got into contact with the ICC for the first time, they talked about *white people*¹⁶⁶ who were coming with others and asked for victims:

¹⁶² Given the long duration of the proceedings and the possibility to apply at later stages, it is possible that more and more persons who want to apply and who are outside of the previous reach of organizations and spokespersons get the opportunity to do so. Furthermore, in the Kenyan case, due to the simple registration, this is very likely and even in later stages, when I was at Nairobi, Kituo was asked if they knew possible case-victims who are not yet registered.

¹⁶³ Haslam and Edmunds (2013), I will come back to the topic of intermediaries and spokespersons in the next chapter which entails a closer analysis of the requirements an intermediary has to fulfil.

¹⁶⁴ „...es gibt schon auch Sprecher von Opfergruppen, die sowieso auch viel in der NGO-Szene so rumspringen und da wortgewandter sind und sich auch mehr trauen gegenüber einem Anwalt...“; “... and there are also those spokespersons of groups of victims, who *jump around* in the NGO scene and who are therefore more articulate and who also dare more vis à vis their lawyer...” [my translation], Interview LRV, 5/3/2014.

¹⁶⁵ Testimony of Juges Mbetingou: Transcripts, Prosecutor v. Jean Pierre Bemba Gombo, Trial Chamber III, 7 May 2012, ICC-01/05-01/08, p. 36.

¹⁶⁶ Testimony of CAR-V20: “When this white lady came, she asked me to present my birth certificate...”, Transcripts, Prosecutor v. Jean Pierre Bemba Gombo, Trial Chamber III, 3 May 2012, ICC-01/05-01/08, p. 27.

“Yes. Let me talk about it. Regarding the first form that we filled with our lawyers, those white people came for the first time, they came to look for the victims, but it was difficult. There were two ladies who arrived as well as a white man. They were accompanied by other people. During that time we were afraid to talk with those white people.”¹⁶⁷

And they confirmed that it was the chairmen – the spokespersons – who pre-selected who was reached, because they were the ones who knew who was a victim within the respective communities:

“It was in my farm. There was the chairman of our village committee who sent a message saying that I should come and see him. I was afraid. And when I returned from the fields in the evening I asked my wife about it and she told me. On that day we were 12 people from various neighbourhoods, there were people from Lipri, Bambu and other places. We went there and we were told to give a report. And it was the chairman of the committee. It was on that day that notes were taken.”¹⁶⁸

“When they came to Mongounba, I was not aware of their arrival. My house is located quite far away from where they were staying. Some of the inhabitants of our area went to meet those ladies and be registered. The mayor of our area has an office in the area where those ladies were staying. He sent someone to fetch me to meet them so I could tell the ICC staff what had happened to me. It is then that I went to meet those ladies, who put a number of questions to me.”¹⁶⁹

“The lawyers did not go to Sibut secretly; they went there officially, and they asked people to come and fill out the forms, and so that is how it came to be that I went to that place to fill out the forms. ... There was no one that we could file a complaint with, and when the lawyers arrived we rushed to see them to fill out the forms and then to wait for some kind of outcome. ... Only victims could fill out the forms. The neighbourhood leaders were there to distinguish between the victims and those who were not victims. Only the victims could fill out these forms.”¹⁷⁰

In my own interviews the pre-selection was conducted by my NGO, my colleagues decided with whom I could safely speak. They selected the respective spokespersons who then chose whom to bring to the meetings. It is the spokespersons who decide who is representative of the victims. This pre-selection is not transparent at all.¹⁷¹

¹⁶⁷ Presentation of views and concerns a/01635/13: Transcripts, Prosecutor v. Bosco Ntaganda, Trial Chamber VI, 1 March 2017, ICC-01/04-02/06, p. 29.

¹⁶⁸ Presentation of views and concerns a/30169/15: Transcripts, Prosecutor v. Bosco Ntaganda, Trial Chamber VI, 1 March 2017, ICC-01/04-02/06, p. 52.

¹⁶⁹ Testimony of CAR-V20: Transcripts, Prosecutor v. Jean Pierre Bemba Gombo, Trial Chamber III, 2 May 2012, ICC-01/05-01/08, p. 26.

¹⁷⁰ Testimony of CAR-V20-02: Transcripts, Prosecutor v. Jean Pierre Bemba Gombo, Trial Chamber III, 8 May 2012, ICC-01/05-01/08, pp 44-45.

¹⁷¹ Field notes, 22/3/2014.

1.1.2. Application forms

In principle, victims who want to participate in the proceedings before the ICC have to fill in an application form. For this purpose the VPRS designed a standard form to be filled in by each individual applicant.

With the growing number of situations and cases and over the time, the number of victims wanting to apply increased significantly. This led to a backlog in the assessment of the applications and consequently to a prolongation of the proceedings. In this respect the VPRS was asked if the legal framework allows for a more collective approach to participation in general:

In response to a question regarding whether there could be a more collective approach to victim participation, since victimization in the Rome Statute crimes tended to be on a collective basis, the representative of VPRS noted that this could be looked into further but that the Rules of Procedure and Evidence provide for individual applications to be made for participation in proceedings, though legal representation can be more collective (rule 90).¹⁷²

In the course of time, different types of application forms and different approaches to the application process were developed by the different Chambers in the cases¹⁷³.

Given the experiences with the standard application form in the first case of the Prosecution v. Lubanga, and the growing numbers of applications, subsequently Chambers developed new application forms and considered more collective approaches already at this stage, even though it is not explicitly foreseen in the legal framework. In some cases the approaches even varied between the Pre-Trial stage and the Trial stage of the proceedings. In order to reconstruct the representational practices that developed over the time, the different approaches are analysed more or less chronologically.

¹⁷² Report of the Bureau on victims and affected communities and Trust Fund for Victims, Tenth Session Assembly of State Parties, 22 November 2011, ICC-ASP/10/31, para. 20.

¹⁷³ At the ICC situations and cases are distinguished. Situations are states in which the Prosecution investigates possible crimes falling under the jurisdiction of the ICC, such as (Democratic Republic of Congo, Uganda, Central African Republic, Darfur, Sudan, Kenya, Côte d'Ivoire, Mali). Cases are those where the Prosecution brings charges against individual Accused, f.e. The Prosecutor v. Lubanga, Katanga, Ntaganda, Bemba, Gbagbo and Blé Goudé, Abu Garda, Banda, Kenyatta, Ruto and Sang.

Until now, beside the standard system, with a 7-pages long application¹⁷⁴ form (previously 17-pages long), five different approaches with different application forms were applied:

In the Gbagbo Pre-Trial-Phase a collective approach was taken¹⁷⁵. Against the backdrop of the VPRS submissions that an exclusively collective approach would be incompatible with the RPE, the Chamber adopted a mixed system. Applicants could either submit an individual standard application form, or join with others to form a group and fill in the respective form with individual declarations.¹⁷⁶

With the increasing number of people who wanted to participate during the Trial Phase in the Kenyan cases, the Chamber decided to delegate the responsibility of assessing the eligibility for participation to the LRVs in cases where participants did not want to appear before the Chamber.¹⁷⁷

The Pre-Trial and Trial Chamber in Ntaganda respectively implemented two further approaches.¹⁷⁸

And finally, the Chamber in the case of the Prosecution v. Ongwen developed a 1-page application form.¹⁷⁹

The process of institutionalization of victim participation can be observed in the streamlining process of the application forms. Based on the standard forms, regulated in regulation 86 Rules of the Court (ROC), the different Chambers developed different forms pre-determining the representational framework practically and textually. It becomes apparent, that when participation is incorporated into an institution with its organisational requirements it is subjected to adjustments following a specific institutional culture of efficiency. The application process is transformed into a manageable, discrete and flexible practice that can be transferred from various contexts, cases and situations. This adjustment of the practice of victim participation can be observed throughout the developments with regard to victim applications, representation and modes of participation. Generally the first step is the

¹⁷⁴ Annex A.

¹⁷⁵ Annex B.

¹⁷⁶ See Annex B.

¹⁷⁷ The application then was operationalized using a registration form, Annex C.

¹⁷⁸ Annex D.

¹⁷⁹ Annex E.

collectivization of victim participants into groups. In the following I will describe this process and the adjustments of the application process, to, subsequently, analyse and discuss the practice for its silencing effect of representation, collectivization and externalization (1.1.3.).

1.1.2.1. The standard form

The information required generally within the application forms are regulated by regulation 86 ROC. The registry, namely the VPRS is responsible for developing the forms.

1. For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, sub-regulation 2. These standard forms shall, to the extent possible, be made available to victims, groups of victims, or intergovernmental and non-governmental organizations, which may assist in their dissemination, as widely as possible. These standard forms shall, to the extent possible, be used by victims.

2. The standard forms or other applications described in sub-regulation 1 shall contain, to the extent possible, the following information:

(a) The identity and address of the victim, or the address to which the victim requests all communications to be sent; in case the application is presented by someone other than the victim in accordance with rule 89, sub-rule 3, the identity and address of that person, or the address to which that person requests all communications to be sent;

(b) If the application is presented in accordance with rule 89, sub-rule 3, evidence of the consent of the victim or evidence on the situation of the victim, being a child or a disabled person, shall be presented together with the application, either in writing or in accordance with rule 102;

(c) A description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court, or, in case of a victim being an organization or institution, a description of any direct harm as described in rule 85 (b);

(d) A description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm as described in rule 85;

(e) Any relevant supporting documentation, including names and addresses of witnesses;

(f) Information as to why the personal interests of the victim are affected;

(g) Information on the stage of the proceedings in which the victim wishes to participate, and, if applicable, on the relief sought;

(h) Information on the extent of legal representation, if any, which is envisaged by the victim, including the names and addresses of potential legal representatives, and information on the victim's or victims' financial means to pay for a legal representative."

According to these required information, the VPRS developed the 7-page long standard application form (formerly 17-page form)¹⁸⁰. Upon its reception, the VPRS reviews the forms. In the first proceedings, in these reviews only the completeness of the information and documentation required was checked. In later proceedings Chambers extended the scope of review including a first assessment whether the forms meet the requirements of Rule 85 RPE. In a next step these reviews and the applications are transferred to the respective Chambers. The redacted versions of the applications are also sent to the parties according to Rule 89 (1) RPE. After having received the observations of the parties the Chambers finally decide if the applications meet the legal requirements – if the applicants are victims eligible to participate in the proceedings. This process is also regulated under regulations 105 et seqq. Regulations of the Registry.

Applicants must therefore demonstrate that they are victims within the meaning of rule 85 RPE, this could be both individuals and organizations. Individual victims are defined as:

"(A) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;"

Within the jurisprudence this is interpreted to require the following criteria:

"The victims' identity appears duly established;

The events described in the application constitute(s) one or more crimes within the jurisdiction of the Court and with which the suspect is charged;

The applicant has suffered harm as a result of the crime(s) with which the subject is charged."¹⁸¹

¹⁸⁰ See Annex A.

¹⁸¹ See, e.g., Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, Decision on victims' participation in the pre-trial proceedings and related issues, 11 June 2014, ICC-02/11-02/11-83, para. 13 (citing Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the

Accordingly, in the first application form, part A consists of questions relating to the personal data of the victim, if s/he is applying for another person, or not, contact details and if someone is assisting in filling in the form. Interestingly, the victim is not addressed directly, but always already presumed to be assisted (represented) by someone else. This is reflected in the language used to address the victim, instead of using the first person, the question is: *“Has the victim already submitted an application for participation or for reparations to the ICC?”* and in part B - information about the alleged crimes, the question is *“What happened to the victim?”* instead of “What happened to you/the person you are acting on behalf of?” When it comes to the language used, the victim is always already represented, either by an intermediary, or some person assisting, or by the notion of *the victim* - an abstract entity, to be filled by the person applying. The implications of this practice will be discussed in the next Chapters.

The relevant information expected from the victim - according to the requirements set out - is: What happened, when did it happen, where did it happen and who might be responsible for what happened. Further, in part C “information about the injury, loss or harm suffered” are required. The alleged victim is asked what effect the events described in the precedent section had on the life of the victim and others around him or her. The possible harm, cited by way of example is physical or mental injury, emotional suffering, harm to reputation, economic loss and/or damage to property or any other kind of harm. Part D asks question about participation, *“Does the victim want to present his/her views and concerns in ICC proceedings?”* Yes - No? If yes, why does the victim want to participate in the proceedings?” And as a side note it is remarked that *“Usually a victim presents his/her views and concerns through a lawyer who represents the victim in The Hague.”*. Part E concerns reparations. If the victim has a lawyer and if yes whom, and if no, whether they need assistance of

Related Proceedings, 4 June 2012, ICC- 02/11-01/11-138, para. 20; Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba, Decision on 772 applications by victims to participate in the proceedings, 18 Nov. 2010, ICC-01/05-01/08-1017, para. 38; Pre-Trial Chamber I, The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“Banda & Jerbo”), Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges, 29 Oct. 2010, ICC-02/05-03/09-89, para. 2; Pre-Trial Chamber II, The Prosecutor v. Bosco Ntaganda, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 Jan. 2014, ICC-01/04- 02/06-211, para. 18; citing, inter alia, Pre-Trial Chamber, The Prosecutor v. Bahar Idriss Abu Garda, (“Abu Garda”), Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 25 Sept. 2009, ICC-02/05-02/09-121, para. 11; Pre-Trial Chamber I, The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, (“Kony et al.”), Decision on victims' applications for participation, 10 Aug. 2007, ICC-02/04-01/05-252, para. 12; Pre-Trial Chamber I, Situation in the DRC, ICC- 01/04-101-tEN-Corr, para. 79.

the court to find a lawyer are questions forming part F of the questionnaire. Additionally the victims are asked if they wanted to be represented by the OPCV until they have a lawyer. The next part consists of information about security and if the victim wants his or her name to be communicated. The last part is called signatures and here, for the first time, the victim is addressed as an I. *“I hereby declare that:”* instead of *“the victim hereby declares that”*.

In abstract, the application forms already regulate how the persons who want to participate in the proceedings are addressed (Part A), what is being spoken about within the proceedings (Part C), the way of speaking - represented, or in person (Part D) and it is also anticipating representational models (Part E) .

1.1.2.2. The approach of the Trial Chambers in the Kenyan Cases

In the Kenyan approach the task of assessing applications is partly delegated to the LRVs in the cases. Deriving from Rule 89 (1) RPE, providing that victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber, the applications are only in few cases transmitted to the Chambers. Victims who do not want to participate in person register with their LRVs, therefore, many of the applications do not even reach The Hague, and the LRVs represents a number of victims whose stories dissolve in a generalized story. All the stories of those who wish to participate without appearing before the Court are not individually considered by the Judges. Those persons register with the court by filling in a registration form¹⁸². The registration form requests *“basic information about the Victim”* - Name etc. Then it contains a declaration: first, *“I confirm my wish, ..., to participate in the ICC proceedings - yes - no; I confirm to have personally suffered from the following crime(s): (select all that apply) - murder of a loved one - forced displacement - rape - inhumane acts - property loss; Resulting in the following harm: physical - psychological - material - other (if other state below),* then there is a question about the revelation of, and here again the third form is used, the victim’s identity. At the end of the form, there is some space for additional information. Consequently, the representation of these persons is, already at this stage of the proceedings, fixed as the mode of speaking.

¹⁸² See Annex C.

Furthermore, what is spoken about is only confirmed, not described. The participants confirm that they have suffered harm resulting from a relevant crime.

The VPRS enters the information into a database which is made accessible to the respective LRVs. In instances where the registration is not possible for victims, for example for security reasons, the LRVs shall nevertheless speak on their behalf – their voices shall be represented “in a general way”¹⁸³. The VPRS is responsible to inform the Chamber periodically with statistics about the victim population and a report about the general situation of victims, registered or not.¹⁸⁴ This is the information, reaching the Judges at The Hague.

All those who want to appear before the Chamber submit a standard form. The LRVs then have to submit a request on behalf of these victims, explaining why “they are considered to be best placed to reflect the interests of the victims, together with a detailed summary of the aspects that will be addressed by each victim if authorized to present his or her views and concerns.”¹⁸⁵ Then the Chamber “makes a preliminary assessments as to whether the suggested form of participation is appropriate and identifies a limited number of victims who may be authorized to participate individually.”¹⁸⁶

The Chamber explained this approach, which is very controversial, with a considerable saving of time and resources.¹⁸⁷ All amendments to the application system are commonly made “*in order to ensure efficient but meaningful participation of victims during the whole proceedings.*”¹⁸⁸

¹⁸³ Trial Chamber V, The Prosecutor v. William Ruto & Joshua Arap Sang, Decision on victims’ representation and participation, 3 Oct. 2012, ICC-01/09- 01/11-460; Trial Chamber V, The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Decision on victims’ representation and participation, 3 Oct. 2012, ICC-01/09-02/11-498, both decisions are similar in their regulations on victim participation, therefore only the former is cited, para 52.

¹⁸⁴ Ibid., para 55.

¹⁸⁵ Ibid., para. 56.

¹⁸⁶ Trial Chamber V, The Prosecutor v. William Ruto & Joshua Arap Sang, Decision on victims’ representation and participation, 3 Oct. 2012, ICC-01/09- 01/11-460; Trial Chamber V, The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Decision on victims’ representation and participation, 3 Oct. 2012, ICC-01/09-02/11-498, both decisions are similar in their regulations on victim participation, therefore only the former is cited, para. 57; For the Kenyan cases, given the termination of the cases, this became irrelevant.

¹⁸⁷ Ibid., para. 36.

¹⁸⁸ Registry, The Prosecutor v. Laurent Gbagbo, Organization of the Participation of Victims, 6 Feb. 2012, ICC-02/11-01/11-29-Red, para 39 (citing, inter alia, The Prosecutor v. William Samoei Ruto, Henry Kirpono Kosgey and Joshua Arap Sang (“Ruto & Sang”), Registry, Proposal for the common

1.1.2.3. Gbagbo variations

In the case against Gbagbo at Pre-Trial, the applicants could submit a standard form individually, or form a group that is represented by a person from their midst acting on their behalf. The individual applications are initially assessed by the VPRS according to their completeness and whether they meet the requirements of Rule 85 RPE and then submitted to the Chambers.

Those applicants whose experiences share common elements, such as “*the recollection of the events and harm common to the members of the group*”¹⁸⁹ were encouraged to join and submit group forms with individual declarations.¹⁹⁰ The person who is authorized by the group to submit the application on their behalf may “*assist in further communications between the court and the victims, if needed.*”¹⁹¹ Above that, the individual declarations provide the victims with the possibility to confirm the events they have suffered from and the harm this caused.¹⁹²

In its design the group form is similar to the individual standard form, it contains information about the identity of the group, among others a name of the group, localization, number of persons composing the group and the common characteristic of the group. Furthermore, the contact person’s details are requested. Section C then contains questions about what happened to the group - with the request to describe as detailed as possible the events. When and where the events happened and who is responsible according to the group. The following section asks about the harm suffered, they are asked about whether they want to participate in presenting views and concerns at The Hague, and if yes why. The last parts hence are the same as the individual form, replacing *the victim* by *the members of the group*. The last section is a list with names of *the victims* and individual signatures. The individual declaration that is to be filled in by the members of the group is similar to the registration form

legal representation of victims, 1 Aug. 2011, ICC-01/09-01/11-243). As a way of streamlining the victim participation process more generally, the Registry further proposed “the production of an initial mapping report, which would identify the main communities of victims affected by the crimes likely to be the subject of the Court proceedings” as well as the development of mechanisms, including “a secure core network of intermediaries”, that would “enable it to rapidly identify, contact and assist relevant victims.” at paras. 34-38.

¹⁸⁹ Pre-Trial Chamber, The Prosecutor v. Laurent Gbagbo, Second decision on issues related to the victims’ application process, 5 Apr. 2012, ICC-02/11-01/11-86, para.21.

¹⁹⁰ See Annex B.

¹⁹¹ Pre-Trial Chamber, The Prosecutor v. Laurent Gbagbo, Second decision on issues related to the victims’ application process, 5 Apr. 2012, ICC-02/11-01/11-86, para. 34.

¹⁹² See Annex B.

described previously. The individual victim, addressed in the first person, herein, confirms that s/he wants to participate, that s/he personally suffered from the events and that this caused harm. The contact details and the consent to the contact person that is named in the group form.

The VPRS then reviews all the forms according to their completeness and makes an initial assessment as to their chance of admission, the applications are submitted to the Chambers and the parties, the respective report entailing the assessment is only submitted to the Chamber. The Chamber then makes its final assessment on this basis and the submissions of the parties.

1.1.2.4. Ntaganda

A further approach was taken by the Pre-Trial and Trial Chamber in the case against Ntaganda. After having consulted with the VPRS about their experiences and observations concerning the two precedent approaches taken, they decided on yet a new way.

The VPRS, concerning the experiences made, submitted that

“in proposing and implementing the approach adopted in Gbagbo the Registry expressly intended to contribute to a review of the victim application system currently under way that is aimed at identifying ways that could be found, whether within the existing legal framework or involving amendments to that framework, to improve efficiency and sustainability and effectiveness, especially in cases involving potentially large numbers of victims, and through the Gbagbo experience, to test an approach with a view to its possible refinement and adoption as a standard model for other situations and cases. The Gbagbo experience provided an invaluable opportunity to test a more collective management of an application process for victims to see whether such an approach could be more practical and efficient, and already the lessons learnt in Gbagbo have been used in designing a victim registration process for victims in Kenya. Consequently, the following observations include some reflections on the suitability of the approach adopted in Gbagbo for future proceedings.”¹⁹³

Furthermore, they emphasized that in Gbagbo it actually was a partly collective approach, since

“[N]o notion of collective harm has been introduced, and indeed, although the alleged events are presented through a common narrative, the Single Judge in Gbagbo underlined that this does not mean the harm loses its individual

¹⁹³ Registry, *The Prosecutor v. Bosco Ntaganda*, Registry Observations in compliance with the Decision ICC-01/04-02/06-54-Conf, 6 May 2013, ICC-01/04-02/06-57, para. 5.

character. Indeed, each applicant is asked to describe, in the individual declaration, the individual harm suffered.”¹⁹⁴

Nevertheless, they alleged that the experiences were not only more efficient for the court, but even, from a psychological point of view the victims benefitted.¹⁹⁵

“This experience has highlighted the positive benefits for many victims of holding such group meetings with Court staff from the psychological point of view, wherever this is feasible, as this can make the application process and other interaction with the Court more satisfying for the victims. Through its experience the VPRS has also learnt that grouping victims already at the application stage not only facilitates the application process itself, but can also facilitate the actual participation of victims subsequently, for instance making it easier for victims' legal representatives to manage their own interaction with their clients if they are already organised in groups according to location or crime.”¹⁹⁶

At the same time,

“The Victims and Witnesses Unit ("VWU"), which provided the VPRS with its evaluation of the Gbagbo experience after its psychologists attended several of the group meetings held with victims, concluded that care is needed in defining which groups could be the beneficiaries of this type of approach, as a group artificially brought together for the purpose of completing a form could lead to a negative experience for the victims.”¹⁹⁷

As a result, the VPRS suggests the following approach, which was basically adopted by the Chamber:

“...a collective process that involves the collection of core information from each victim, while other information pertaining to a group can be collected and stored separately by the VPRS (such as information concerning how and where to meet members of the group, vulnerable members, security concerns etc). This information can be linked to a group in VPRS's information systems. In this scenario, each victim would only complete a short form of one or two pages with information that is essential for assessing the application as well as minimum contact details... so that form could then stand alone as the application, as it would include all the information required under the legal framework.”¹⁹⁸

¹⁹⁴ Ibid., para. 6.

¹⁹⁵ They do not indicate how they came to this conclusion, which is interesting since it contradicts the narrative of telling ones story and being acknowledged individually as a subject within the proceedings. This will be further discussed, because it also contradicts what LRVs told me about group meetings and individual meetings.

¹⁹⁶ Registry, *The Prosecutor v. Bosco Ntaganda*, Registry Observations in compliance with the Decision ICC-01/04-02/06-54-Conf, 6 May 2013, ICC-01/04-02/06-57, para. 7.

¹⁹⁷ Registry, *The Prosecutor v. Bosco Ntaganda*, Registry Observations in compliance with the Decision ICC-01/04-02/06-54-Conf, 6 May 2013, ICC-01/04-02/06-57, para. 8.

¹⁹⁸ Ibid., para. 9.

Accordingly, a two pages application form was drafted, which contained only the information “strictly required by law” for the determination of the victim status pursuant to rule 85 RPE. Similar to the individual declaration in Gbagbo, the applicants therefore provide information about their identity, the date of the crime(s), the location of the crime(s), a description of the harm suffered as a result of the crime(s) allegedly committed by the suspect in the case, proof of identity and signature.¹⁹⁹ Again, it is formulated as a confirmation and therefore addresses the victim in the first person. “*I confirm to have personally suffered from the following events...*” A crucial difference consists in the part about legal representation. Instead of asking whether the victim already has a lawyer, the victim is asked whether s/he has any objections to being represented by a single lawyer appointed to represent all of the victims in the case. The next question asks which criteria the victim would want to be considered in the selection process of a legal representative.²⁰⁰

Like in the case against Gbagbo, the VPRS makes a first assessment and above that organizes the applicants into groups. The criteria for this grouping includes the location of the alleged crimes, the harm suffered, the gender of the victims, and other specific circumstances common to victims.²⁰¹ Afterwards, the applications, together with the respective report are send to the Chamber, redacted versions of the applications and the report are then transmitted to the parties. The Chamber assesses individually while deciding on each group. The Pre-Trial Chamber applied these changes to the preceding approaches “*with a view to rationalizing the application process and enhancing its predictability, efficiency and expeditiousness.*”²⁰²

The Trial Chamber in Gbagbo basically took over this approach rather than referring to the approach taken by the Pre-Trial Chamber.

When the Pre-Trial Chamber committed Ntaganda to trial in June 2014, the Trial Chamber again asked the parties and participants about the application procedure

¹⁹⁹ See Annex D; Pre-Trial Chamber, The Prosecutor v. Bosco Ntaganda, Decision Establishing Principles on the Victims’ Application Process, 28 May 2013, ICC-01/04-02/06-67, para. 30.

²⁰⁰ See Annex D.

²⁰¹ Pre-Trial Chamber, The Prosecutor v. Bosco Ntaganda, Decision Establishing Principles on the Victims’ Application Process, 28 May 2013, ICC-01/04-02/06-67, para. 35. The respective reports are filed confidential ex parte and are hence not available.

²⁰² Ibid., para. 1.

envisaged in the Trial Phase.²⁰³ The Registry in turn suggested two possible systems, first to take over the system applied in Pre-Trial Phase, noting however that

“[T]he most time and resource consuming element...is the preparation of the individual paragraphs describing the Registry’s Rule 85 assessments of completeness and inclusion within the scope of the Case. Redactions associated with these reports and on the applications themselves are also extremely time and resource intensive for the Registry”²⁰⁴

Given the limited resources, the VPRS predicted a timeline of one year if the current system was upheld.²⁰⁵ Against this backdrop, the VPRS then suggested a second option (The modified Kenya approach) which it considered to be more sustainable.²⁰⁶ The LRVs in response to this approach submitted that it would deprive the victims of their rights enshrined in Article 68 (3) of the Rome Statute. They emphasize that,

„...any said person, organisation and institution deemed to comply with the criteria under rule 85 of the Rules of Procedure and Evidence should be given the possibility to enjoy the right as enshrined under article 68(3) of the Rome Statute to participate at the trial proceedings in an effective and meaningful manner - as opposed to a purely symbolic, including the possibility to contribute to the truth to be established and to the Justice to be done as well as the possibility to tell their story and to have their story heard within the judicial framework....

The Legal Representatives submit that the possibility to tell their stories and to share their difficult and painful experiences with the judges constitutes one of the ways whereby the victims can positively contribute to the search for the truth. For the absolute majority of victims, except a very limited number of them enjoying the dual status of witness and victim, or appearing in person to present their views and concerns, the process of application for participation appears to be the only way to provide an account of their experience which might be of relevance for the search for the truth.”²⁰⁷

„But none – neither the parties nor the judges – would ever be in a position to hear the very personal and tragic stories of the other victims, because they

203 Trial Chamber VI, The Prosecutor v. Bosco Ntaganda, Order Scheduling a Status Conference and Setting a Provisional Agenda, 21 July 2014, ICC-01/04-02/06-339.

204 Registry, The Prosecutor v. Bosco Ntaganda, Registry submission to “Order Scheduling a Status Conference and Setting a Provisional Agenda”, 14 Aug. 2014, ICC-01/04-02/06-350, para. 16.

205 Registry, The Prosecutor v. Bosco Ntaganda, Registry submission to “Order Scheduling a Status Conference and Setting a Provisional Agenda”, 14 Aug. 2014, ICC-01/04-02/06-350, para. 14.

206 Trial Chamber VI, The Prosecutor v. Bosco Ntaganda, Decision on victims’ participation in trial proceedings, 6 Feb. 2015, ICC-01/04-02/06-449, paras 7-9.

207 Legal Representatives of Victims, Prosecutor v. Bosco Ntaganda, Joint submissions in accordance with the “Order Scheduling a Status Conference and Setting a Provisional Agenda” issued on 21 July 2014, ICC-01/04-02/06-351, 14 August 2014, paras 19-20.

would only be invited to register in a manner that is not linked to any judicial context.”²⁰⁸

Nevertheless, the Chamber adopted a modified system, taking into consideration, the

„specific circumstances of this case, including: (i) the large number of victims expected to express interest in participating at trial (ii) the 2 June 2015 trial commencement date; (iii) the situation of the victims and (iv) the fact that all participants submitted in favour of a greater degree of judicial oversight in this case than that required by the Kenya Trials Approach.”²⁰⁹

Within this context, the Chamber developed an approach drawing on the VPRS second option. In concrete, the applicants continue to fill in simplified forms, like in the Pre-Trial stage, These forms are submitted to the VPRS, which, on the basis of the instructions by the Chamber, reviews and assesses them in order to divide them into three groups; applicants who clearly qualify as victims (A), applicants who clearly do not qualify as victims (B), and those for whom the VPRS could not make a clear determination (C). The VPRS maintains a database of those persons who qualify as victims and provides the LRVs with access. Applications are transmitted to the Chamber „on a rolling basis”.²¹⁰ The respective report prepared by the VPRS is submitted to the Chamber, parties and the LRVs, together with all applications falling under group C, 60 days prior to the commencement of the trial. With regard to group A and B applications, the Chamber ratifies the VPRSs assessment and the report is due 15 days before the trial.²¹¹ Every four months the VPRS transmits a report on the general situation of participating victims, this is done in cooperation with the LRVs who specify „their activities amongst victims”.²¹²

This option was adopted by the Chamber with the explanation that

„The Chamber additionally notes that Rule 89 of the Rules contains no express requirement for individual consideration of each application by the Chamber... More generally, the Chamber considers that Rule 89(1) of the Rules should be interpreted in light of Rule 89(4), which gives the Chamber discretion to

²⁰⁸ Ibid., para. 31.

²⁰⁹ Trial Chamber VI, The Prosecutor v. Bosco Ntaganda, Decision on victims’ participation in trial proceedings, 6 Feb. 2015, ICC-01/04-02/06-449, para. 23.

²¹⁰ Trial Chamber VI, The Prosecutor v. Bosco Ntaganda, Decision on victims’ participation in trial proceedings, 6 Feb. 2015, ICC-01/04-02/06-449, para. 24.

²¹¹ Trial Chamber VI, The Prosecutor v. Bosco Ntaganda, Decision on victims’ participation in trial proceedings, 6 Feb. 2015, ICC-01/04-02/06-449, para. 24.

²¹² Ibid., para. 24.

'consider the applications in such a manner as to ensure the effectiveness of proceedings.'²¹³

„The Chamber does not consider that such a procedure detracts from the meaningful participation of victims in ICC proceedings. In fact, this kind of procedure will expedite the processing of victims' applications and allow them to participate through their LRVs at the earliest possible juncture.“²¹⁴

„...victim applications are 'an account of their experience' that is of 'relevance for the search for the truth'. While the Chamber considers such factors to be important within the broader framework of victim participation, it is recalled that Chambers have only been evaluating victim applications to a *prima facie* standard for the purposes of participation; they are not making any concrete determination on the veracity of the claims therein.“²¹⁵

Now, the deviation from the norm regulating the application process, Rule 89 (1) RPE is expressly stated and the reason is to ensure the effectiveness of the proceedings. This effectiveness, it is argued, even benefits the participating victims, therefore it is also meaningful. And while recognizing that the information given by the participants that reach the Chamber are thereby significantly limited, in the context of the search for the truth, this information is said to nevertheless be of limited value.

1.1.2.5. Ongwen

The latest application form was developed in the case of the Prosecution v. Ongwen. It consists of a one-page document asking the applicant, or the person acting on behalf of “the victim” to confirm to have personally suffered harm, from the following events, leaving eight columns to describe the events. The second “question” just says: “2. Resulting in the following personal harm:...On this date:...At this location... Subsequently there is again one column left to answer “Who, in the view of the applicant, is responsible for the events?”²¹⁶ The third, last, question aims at knowing whether “the victim” intends to apply for reparation. At the top of the document, information concerning the identity of the applicant are required: Name, Date of Birth, or Age and Ethnic Group or Tribe. The form is completed adding the signature, the date and the location. The processing of these application forms it yet

²¹³ Ibid., para. 31.

²¹⁴ Ibid., para. 33.

²¹⁵ Trial Chamber VI, The Prosecutor v. Bosco Ntaganda, Decision on victims' participation in trial proceedings, 6 Feb. 2015, ICC-01/04-02/06-449, para. 36.

²¹⁶ See Annex E.

again simplified. The Pre-trial Chamber II, represented by the Single Judge decided, that:

“(i) the Registry shall assess all victim applications for participation received or collected in the present case, and transmit to the Chamber and the Prosecutor, and (redacted as appropriate) to the Defence, all complete applications falling within the scope of the case against Dominic Ongwen; in case of doubt, the Registry shall consult with the Single Judge and request guidance;

(ii) the Prosecutor and the Defence shall have 14 days upon notification of victim applications to raise any specific objection to individual applications;

(iii) all those victims whose applications for participation have not been objected by either party, or otherwise rejected by the Single Judge, are admitted to participate in the proceedings upon expiration of the time limit for the parties’ objections;

(iv) any contested application to which objections are presented by either party within the relevant time limit shall be decided upon individually by the Single Judge.”²¹⁷

Basically, the evaluation and decision on admission is left to the VPRS. The Single Judge only decides in controversial cases. The information asked from the applicants is reduced to a minimum.

1.1.3. Collectivisation, representation and externalization

The subtext of the institutionalization of victim participation is that the implementation has to be meaningful and still effective and the tension is basically underlying all legal struggles and reforms. By stating that the deviation from 89(1) RPE is necessary to maintain effective proceedings and at the same time allege that the meaning is not lost, the tension between effectiveness and meaning is solved. When reading these decisions as fresh judgements it is clear, that the application of a general norm always entails exclusionary violence. Therefore, in the following I will work out the exclusions of the practice of applications. The exclusionary practice developed concerning the application process, and the information asked for in the application forms, is always also determining who may speak about what, to whom in which context. My theoretical approach reveals that practices of representation are always also practices of silencing and that although silence can have a subversive potential, it is refusal as silence and not being silenced. The following analysis shows

²¹⁷ Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3. Sept. 2015, ICC-02/04-01/15-299, p 7.

that the process of institutionalization of victim participation entails a lot of silencing of actual individuals while representational relationships are obscured. I differentiate in the practices of silencing between representation, collectivization and externalization. Nevertheless, it is important to bear in mind that representation is a practice that at the same time collectivizes and externalized. Collectivization is only possible through different modes of representation and is itself a way to externalize. And externalization is achieved through representation and collectivization. The three practices of silencing are interrelated. And, they are all hierarchically structured.

In the first part I will discuss the representational practices entailed in the application process and in the language of the application forms (1.1.3.1.). This representational practice will be traced throughout this chapter. The same applies to the next part addressing the collectivization processes, where the principle of individualism prevailing in the context of criminal law is negotiated against the backdrop of efficiency and the application process is mainly discussed as managing numbers, while upholding the fiction of meaningful participation in the sense of individual participation (1.1.3.2.). Externalization processes within the application practice are entailed in the subsequent limitation of information asked for in the application forms and the fact that these information are kept in a database with the Registry and hardly ever reach the Chambers anymore (1.1.3.3.). In the last part, I will address the strategies to counter this development, confronting the Judges with the exclusionary practices and re-emphasising the meaningful in *meaningful and effective*, thereby upholding the narrative and remaining within the tension (1.1.3.4.).

1.1.3.1. Representation: “I confirm that *the victim* is speaking.”

“I signed that document, because when that person asked me questions, I understood that from that point in time onwards, I was one of the victims.”²¹⁸

There are two dimension with respect to representation that play a role in the application process. The first is the personal representation, that is to say, persons who represent the applicants in the application process. The second is the representation of *the victim* as victim in the proceedings at the ICC. Meaning the framing of *the victim* that determines who is legible as victim in the proceedings and

²¹⁸ Testimony of DRC-V19: Transcripts, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Trial Chamber II, 21 February 2011, ICC-01/04-01/07, p. 72.

who is not. Both are inherently hierarchical with regard to the (legal) relevance and the power of definition.

Concerning personal representation, it is noteworthy that in the application forms it is already presumed, that the applicants are assisted by another person, they are not directly addressed. Instead, in all application forms, another person allegedly helping *the victim* is directly addressed:

*“Has the victim already submitted an application for participation or for reparations to the ICC?”*²¹⁹

This question only makes sense, when assuming that another person assisting *the victim* is the addressee of the form. This person is asked whether the victim has already submitted an application. This also means that it is not presumed that the person assisting *the victim* is simply reading the questions in the form to *the victim*, because in this case the question could still have been: *Did you already submit an application for participation...?*

The person assisting *the victim* is indirectly addressed as the active part, filling in the form *for* the victim and not (more passively) *on behalf of* the victim. The latter case is foreseen for persons acting on behalf of victims under 18, disabled victims or victims who gave their consent. Another question asks for the person, or specifically interpreter, assisting *the victim* to fill in the form, this is the person addressed by the form in the first place. Hence, from the very beginning it seems to be assumed that there is a person *acting for the victim*, a person who is *speaking about the victim*. From the information about the mapping process it follows that these persons are either spokespersons from the victim communities who are trained by national and international NGOs and/or personnel from these national and international NGOs and/or Registry staff (mostly VPRS). This is to be separated from the provisions for legal representation. The victim is always already addressed as someone who is represented. Someone who is in need of assistance.

The hierarchical relationship between the ICC staff, the international NGOs and the national/local counterparts is implied in the language - the intermediaries *may*

²¹⁹ See Annex A, B, Question 3. and 4. in Annex C, Question 6., 7., 8. Annex D.

assist, provide information etc., to a varying extent, they are native informants.²²⁰ Furthermore, the reliability of spokespersons and community leaders is confirmed by national NGOs and the latter are in turn validated and confirmed by international NGOs, who are self-evidently more trustworthy. All intermediaries are supposed to be controlled by the Registry, which then has to report to the Chambers.

Concerning legal representation, the principle of choice was still presumed in the first application forms, whereas the development then was from “Does *the* victim have a lawyer?” to “Does *the victim* have any objections to having a single lawyer appointed to represent all the victims in the case?”²²¹ From the very beginning, in a note, the victim is informed that representation is the rule, while presenting views and concerns in person is the exception.

In conclusion, with respect to personal representation, in the application process *the victim* is assumed to be always already represented - it is presumed that there is a person who is speaking about the victim - who is addressed to become active for the passive victim that is in need of assistance.

The second, probably less obvious dimension of representation, is that the individual applicant is only once addressed as a subject that is not yet a victim in the application form, as an *I* - whoever that may be. The space for individuality beside the role of *the victim* is reduced to the confirmation of being a victim. The power to define what makes a victim rests with the ICC, as will become very clear in the course of the analysis. From the very first moment of contact with the court, the individual applicant (*I*) signs that s/he is represented by *the victim* throughout the proceedings, provided that the deciding authorities accept the victim status of the individual. One could re-phrase the confirmation as: *I* confirm that *the victim* is speaking. (signature). The *I* can, from now on, only speak as *the victim* when s/he wants to be heard within the legal framework. It is the (legal) definition of the victim that determines what can be heard and consequently also regulates who can speak.²²²

²²⁰ The field assistants, and the intermediaries of national NGOs as native informants will be discussed in Chapter 8.

²²¹ The issue of choosing representation will be discussed in the next part on legal representation.

²²² The notion of *the victim* will be unfolded throughout the dissertation. The question of who may speak as *the victim* will be analyzed in the next Chapters 6 through 8.

The contours of *the victim* are decisive for the legibility and illegibility within the practice of victim participation at the ICC.

1.1.3.2. Collectivization: From individual to individualized participation

Collectivization can be observed in three forms in the process of institutionalization of the application process. Firstly, the application process in the Gbagbo proceedings is designed as a partly collective approach, applicants are urged to form groups to fill in group forms. Secondly, the application forms are individual and the grouping is subsequently organized by the Registry and thirdly, voices of the victims (accepted or not, registered or not) are to be presented “in a general way” by the VPRS and/or the legal representatives.

The overall topic of dealing with many individual applicants is effectively “managing numbers”²²³ while collecting and storing the core information of each victim. *The victim* becomes - *the group of victims*, becomes *the victims*. This process leads to the marginalization and homogenization of individual stories since *the victims* story can be transmitted “in a general way”, thereby it is clear that the individual stories in the application forms do not even reach the Chambers any longer. This also illustrates that it is not the individual traumatic memory that is of relevance at The Hague. Victims and their stories are effectively managed (mainly by the VPRS and LRVs) implying that victims are something to be managed and the ICC organs are the managers. The victims are passive and unorganized masses to be managed by the ICC in the application process. This is a pattern that can be observed throughout the practice of victim participation. Basically, from the point of view of The Hague it suffices when the Registry and/or the LRVs speak for or about *the victims*.

Since this tendency is contrary to the principal of individuality as it is established in the Rome Statute, especially in the Gbagbo case, the tension this caused became obvious. The Chamber had to re-iterate the acknowledgement that the harm is still perceived as an individual harm. and that the process is only partly collective. The justifying argumentations follows a pattern that will be unfolded in the following chapters. While turning a generally individual process into a mostly collective one,

²²³ “Over one thousand is still feasible.” Interview with LRV, 25/6/2014.

individuality is still perpetuated in a sense, that participation is said to remain meaningful (individual) while collectivization is necessary to allow effective proceedings to be conducted. In this vein, a representative told me:

“Well until now the application is conceived as an individual process and they, meaning the victims, they consider themselves individuals even if they are grouped for the purpose of representation. For them it is important that they are recognized as an individual.”²²⁴

Given the process of collectivization, it is the task of their representatives to give the victims the feeling to be recognized individually, which is different to being recognized as an individual.

1.1.3.3. Externalization: Pre-selecting relevant information

Another important development in the application forms is the space provided for the description of what happened and the effect this had on the applicant.

In the beginning there is free space to describe the events *in as much detail as possible* and to also describe which effect the crimes had on the life of the applicant and others around him or her. In the latest forms, the applicants could only confirm that they had suffered harm from one or more of the listed crimes by ticking the respective boxes. The same procedure applies to the resulting harm. This limitation from individual information to strictly relevant information under the law is furthermore reflected in the reduced page number of the application forms. From 17 to 1-2 pages. Thereby the notion of *the victim* to which the individual has confirmed to belong (in the individual declarations) is reduced to a legally pre-described image. This image is subsequently not being influenced by the victims themselves but it is defined and shaped by what the Chambers consider necessary. The relevant information with regard to what happened and the effects of what happened are pre-defined by the ICC to be the crimes and the allegedly resulting harm, which is physical, psychological, material, or other. It is not the applicant who decides what is the relevant information with regard to the crimes and the harm to transmit to the ICC, but the other way around. There is no more space for different emphasis, different wording, generally everything that makes information that are included in forms in any way more personal. There is no more space for individual stories about

²²⁴ Interview with LRV, 16/6/2014.

the traumatizing violence and its effects. The language provided for traumatic violence is *crimes* and for the effects it is *harm*. Thereby complexity, homogeneity and feelings are decisively reduced or even effaced from the image of *the victims*, at least during the application process. The own words of individual applicants are hardly ever represented in the process. Against the backdrop of the noble goals of participation, the development goes from telling one's story to ticking boxes. The transformation of individual applicants into *the victims* as object of a bureaucratic process is the exact opposite of what is propagated. Instead, the victims are streamlined within the application process according to the legal requirements set at The Hague and thereby everything that is not required by the law is foreclosed. The subjective accounts are externalized within the strictly legal proceedings to the interactions between the LRVs, intermediaries etc. with those for and about whom they are speaking.

1.1.3.4. Opposition? Emphasizing the meaningful

As has become relatively clear from the analyses of the application process, the victim is addressed by the court in the first formal contact as someone who is already represented, the individual dissolves in group representation and becomes *the victims* and the selection of the relevant information required is undertaken by the Registry and the Chambers. The irritation this caused, particularly against the backdrop of the telos of victim participation propagated by the Court, is negotiated within the tension of *effective and meaningful*. The fact that even the limited information provided in the application forms are in most cases not assessed by the Chambers, and therefore not perceived by the Judges anymore, raised the opposition of the LRVs in Ntaganda. As described, they filed a joint submission reminding the Chamber of the telos of victim participation - truth and justice - and that victims should meaningfully contribute to the "truth to be established and the Justice to be done."²²⁵ Interestingly, the legal representatives emphasize that participation, to be meaningful, implies having one's story heard within the legal framework, and not only providing the possibility to tell it. Thereby, they touch upon the core problematic of representation. The meaning of speaking is being heard, without the listener, speaking has no effect and is therefore

²²⁵ Legal Representatives of Victims, Prosecutor v. Bosco Ntaganda, Joint submissions in accordance with the "Order Scheduling a Status Conference and Setting a Provisional Agenda" issued on 21 July 2014, ICC-01/04-02/06-351, 14 August 2014, para 19.

meaningless - symbolic. This is what they add to the pair of *meaningful and effective* - symbolic.²²⁶ Participation has to be meaningful and effective as opposed to purely symbolic, indicating that without being heard, victim participation in general is reduced to a symbolic act. That *the victim* has a symbolic, in a sense of legitimizing, function for the ICC is discussed in Part I Chapter 2. But this is a conclusion that cannot be openly discussed within the practice of legal representation. In order to fulfil the symbolic function, the fiction of the legitimizing narratives of creating a framework of meaningful and effective participation, where victims' views and concerns are spoken and heard has to be uphold. The legal representatives threaten to reveal the symbolic nature of participation. Nevertheless, instead of radically calling into question the feasibility and revealing the emptiness of meaningful and effective, which can be filled in any way possible, the legal representatives acknowledge the framework by emphasising the meaningful. They are still complicit in a way that they confirm the narratives perpetuated in the rhetoric and the illusionary believe that at some point there is truth and justice and that the access of *the victims to the truth* and *the justice* can be organized in a meaningful and effective way. They adhere to the notion of legal closure elaborated in the previous chapter. The Chambers decision taking into consideration the LRV's submissions shows that they are not considerate of the problematic of hearing, or put differently, they remain in the strictly legal rationale of hearing. Namely admissibility- what could principally be used within a judgement - determines what is heard in the proceedings. Thereby the Chamber re-iterates the legal framework of speaking and hearing. In so doing they also determine that the relevant truth is the outcome of the proceedings. And only that which fulfils the evidentiary threshold becomes part of the final truth which does justice. Thereby the irritations of the possibility of meaningful and effective participation caused by adding the symbolic dimension is decided upon. The basic legitimizing gap revealing the dependency of the Court on *the victims when doing justice*. The justice gap opens up - and - is closed.

²²⁶ Joint submissions in accordance with the "Order Scheduling a Status Conference and Setting a Provisional Agenda" issued on 21 July 2014, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-351, 14 August 2014, para 19.

1.2. The organization of legal representation

The tensions occurring during the application phase and the respective strategies of representation, collectivisation and externalization within the development of the now used modality of application are prevailing in the search for an effective and still meaningful mode of legal representation as well. One can easily imagine that the legal representation of 4160 victims, in the latest Ongwen case, is a challenge. Arriving at the current model of legal representation, applied in the Ugandan situation and the Ongwen case, was a struggle throughout which many different modalities were developed by the different Chambers. One could rightfully say, that the legal struggle fought by the LRVs in the cases is exemplary for the opposition to the development of the current model of representation, which is considered to be most effective. The trend goes to "in house representation", basically because it is resource saving, according to the Chambers.²²⁷ As indicated in the application forms, where the victims were first asked whether they have legal representation and whom they would choose, in the last forms they were simply asked if they have problems with being represented by one single lawyer, possibly from the OPCV.²²⁸ Given this development, it is clear that the choice of legal representation first granted to victims was sacrificed for the more efficient version of common legal representation by the OPCV and a field assistant. The Chambers, as is the case with all matters concerning victim participation have a large scope of discretion designing the representational framework, interpreting the central norm Rule 90 RPE:

"Legal representatives of victims

1. A victim shall be free to choose a legal representative.
2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination

²²⁷ Pre-Trial Chamber I, Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Laurent Gbagbo, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, para 45; Trial Chamber I, Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15-205, para 70; Trial Chamber IX, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims, 26 May 2016, ICC-02/04-01/15-445, para. 12.

²²⁸ See Annex A Part F, Annex B with the presupposition of free choice, Annex D presupposing common legal representation and Annex E lacking any question with regard to legal representation.

of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.

4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.

5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.

6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1."

Furthermore, regulation 80 of the RoC specifies that,

"Appointment of legal representatives of victims by a Chamber

1. A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require.

2. The Chamber may appoint counsel from the Office of Public Counsel for Victims."

The central tension of legal representation is illustrated in these norms. In principle victims can choose a legal representative, but in the interest of effectiveness – and/or in the interest of justice - the Chamber with the assistance of the Registry may group victims and choose common legal representation for them. Generally, the regulations are based on the right to a counsel, which includes the freedom to choose counsel. But in practice this proved cumbersome and now the application of Rule 90 (2) RPE in combination with regulation 80 RoC became the rule rather than the exception. Furthermore, although in principle otherwise regulated, it is unclear how the victims are involved in this process. Against the backdrop of the representational practices framing who is speaking for whom, this practice makes clear that one can hardly speak of the victims' voices at The Hague any more. Legal representatives are the voices of the victims at the court and the victims themselves in the minority of cases chose their own representatives. Sometimes, Chambers even decided against

the expressed will of the participating victims.²²⁹ Above that, similar to the development in the application phase, victims are more and more collectivised and the numbers of participating victims represented by a single LRV are increasing.²³⁰ Furthermore, the processes of consultations between lawyer and clients are very obscure, different types of intermediaries and field assistance play an important role here. Accordingly, the chain of representation from The Hague to the individual victim is further prolonged.

To illustrate these developments, I will proceed by analysing the decisions relying on Rule 90 RPE taken by the Chambers in the different cases before the Court framing legal representation.

1.2.1. Lubanga/Katanga²³¹ : External legal representation

In the beginning, as foreseen in the RS and the RPE, the appointment of external legal counsels as legal representatives was the rule. During the Pre-Trial Phase the victims who were granted participatory rights were represented by the lawyers they chose. There were only four victims participating represented by three external lawyers.²³² During the confirmation of charges hearing, lawyers represented the victims with the assistance of the OPCV. However, at that early point in time and given the few victims participating, it seems that the Pre-Trial Chamber simply did not consider it necessary to impose common legal representation. Nevertheless, in the first decision on victim participation issued by Trial Chamber I in the Lubanga proceedings, it was considered necessary to adhere that

²²⁹ See the discussion of the Chambers decisions in the situation of Darfur, Sudan in the case of the Prosecution v. Banda and Jerbo, in the following; 1.2.3. and the Trial Chamber decision to change the LRV from Pre-Trial to Trial Phase, in the following: 1.2.7..

²³⁰ See the development discussed below in 1.2.1. from the case of the Prosecution v. Lubanga, to the case of the Prosecution v. Bemba, 1.2.2. In the Kenyan cases, the voices of the victims shall be represented in a general way, not even referring to the individual participants any longer, see 1.2.7.

²³¹ In the most recent case, three victim applicants have all indicated their wish to be represented by the same external lawyer, who was on the list of counsel and therefore appointed by the Chamber as the common legal representative in the case. Trial Chamber VIII, Situation in the Republic of Mali in the case of the Prosecutor v. Ahmad al Faqi Al Mahdi, 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', 8 June 2016, ICC-01/12-01/15-97-Red, para 38.

²³² Legal Representative of Victims, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, Written submissions of the legal representative of victim a/0105/06, 1 December 2006, CC-01/04-01/06-745-tFR; Legal Representative of Victims, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, Observations made during the confirmation of charges hearing on behalf of Victims a/0001/06, a/0002/06 and a/0003/06, 4 December 2006, ICC-01/04-01/06-750-tEN.

“the personal appearance of a large number of victims could affect the expeditiousness and the fairness of the proceedings, and [given] that the victims’ common views and concerns may sometimes be better presented by a common legal representative”²³³.

This line of argumentation anticipates an important pattern that can be traced throughout decisions on participation and representation. This pattern is underlying the development up to the common legal representation of all victims participating in a case as one group by one LRV. At that point in time, however, compared to the numbers of victims participating in the more recent cases, the number of 146 persons participating in the Lubanga Trial Phase was relatively low, all the more so, as they were represented by five teams of lawyers.²³⁴ When taking into consideration the possible need to organize common legal representation, the Trial Chamber anticipated the following considerations:

„the language spoken by the victims (and any proposed representative), links between them provided by time, place and circumstance and the specific crimes of which they are alleged to be victims will all be potentially of relevance.”²³⁵

The Chamber then agreed with the submissions of the legal representatives of victims that decisions under rule 90 RPE should not be rigid

„and instead will depend on whether at a certain phase in the proceedings or throughout the case a group or groups of victims have common interests which necessitate joint representation. The Chamber accepts the defence submission that this approach should promote clarity, efficiency and equality in the proceedings.”²³⁶

The approach actually taken is unique, and the Chamber already indicated that the practice might not become the rule. In the following decisions, common legal representation was progressively pre-defined by the Chambers, especially, when the practice changed to only applying regulation 80 RoC without even considering the

²³³ Trial Chamber I, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para. 116.

²³⁴ See, Case Information Sheet, ICC-PIDS-CIS-DRC-01-015/16_Eng.

²³⁵ Trial Chamber I, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para 124.

²³⁶ Ibid., para 125.

sequential structure for the selection of common legal representation underlying rule 90 RPE.²³⁷

In the second Congolese case against Katanga, initially, during Pre-Trial Phase there were eight external legal representatives, who were appointed by their clients. The OPCV represented those who were yet unrepresented. For the Trial Phase, Trial Chamber II considered it necessary, given the increasing number of applications, to organize common legal representation.²³⁸ The guidelines leading the decisions were that participation through legal representatives should be as *meaningful as possible as opposed to being purely symbolic*, to that end there should be a steady and reliable flow of information to the victims and real involvement of the victims.²³⁹ At the same time the Chamber considers itself to be duty-bound to ensure *efficient proceedings* with appropriate celerity. Thus, the participation of victims should not have a too heavy burden on the defence.²⁴⁰ Furthermore, while acknowledging that victims are in general free to choose a legal representative, “this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court.”²⁴¹ And,

“Common legal representation is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible.”²⁴²

For these reasons, in the end of the Trial Phase two external counsel were appointed for 366 participants. The group of victims was divided into former child

²³⁷ I will elaborate on this in the next paragraphs. Generally, it is striking that the development is similar to the development at the ECCC, where common legal representation of all victims as one group is now mandatory while in the beginning a strictly individual approach was envisaged, see Part I Chapter 1.

²³⁸ Trial Chamber II, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Order on the organisation of common legal representation of victims, 22 July 2009, ICC- 01/04.01/07-1328.

²³⁹ Trial Chamber II, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Order on the organisation of common legal representation of victims, 22 July 2009, ICC- 01/04.01/07-1328, para 10.

²⁴⁰ Ibid., para 10.

²⁴¹ Ibid., paras 10-11.

²⁴² Ibid., paras 10-11.

soldiers and other victim participants.²⁴³ The common legal representatives were asked to “both represent(ing) the common interests of the victims during the proceedings and for acting on behalf of specific victims when their individual interests are at stake.”²⁴⁴ Two lawyers representing participants during the Pre-Trial Phase were appointed as common legal representatives in the Trial Phase.²⁴⁵

1.2.2. Bemba: External legal representation

In December 2008, The Single Judge representing Pre-Trial Chamber III in the case against Jean-Pierre Bemba, rendered a decision requesting all victims recognized in the case to choose one common legal representative from the Central African Republic.²⁴⁶

To ensure the effectiveness of the Pre-Trial proceedings the Judge considered it appropriate for those who were granted victim status to present their views and concerns through a single common legal representative.²⁴⁷ Noting that all participants,

“allege to have suffered of mainly similar crimes, which occurred on the territory of the Central African Republic (the “CAR”) and were allegedly committed by the same group of perpetrators” wherefore “one common legal representative, preferably from the CAR, should be chosen by all victims...” The criteria applied are “(i) the language spoken by victims, (ii) links between them provided by time, place and circumstances (iii) the specific crimes of which they allege to be victims, (iv) the views of victims, and (v) respect of local traditions.”²⁴⁸

Those who objected to being represented by a common legal representative were represented by the OPCV.²⁴⁹

²⁴³ Trial Chamber II, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Order on the organisation of common legal representation of victims, 22 July 2009, ICC- 01/04.01/07-1328, paras 9-10.

²⁴⁴ Ibid., para 13.

²⁴⁵ Registry, Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, “Désignation définitive de Me Fidel Nsita Luvengika comme représentant légal commun du groupe principal de victimes et affectation des victimes aux différentes équipes”, 22 September 2009, ICC-01/04-01/07-1488.

²⁴⁶ Pre-Trial Chamber III, Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Fifth Decision on Victims’Issues Concerning Common Legal Representation of Victims, 16 December 2008, ICC-01/05-01/08.

²⁴⁷ Ibid., para. 7.

²⁴⁸ Ibid., para. 9.

²⁴⁹ Ibid., para. 12.

The Trial Chamber then decided that two common legal representatives were to represent participating victims during trial, the groups were formed following a geographical logic.²⁵⁰ Basically the criteria developed in the jurisprudence of the court has been applied:

„(a) the need to ensure that the participation of victims, through their legal representative, is as meaningful as possible, as opposed to purely symbolic; (b) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial; (c) the Chamber's duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity; and (d) the Chamber's obligation under Article 68(3) of the Statute to ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.“²⁵¹

In the specific circumstances of the case, the Chamber urged the Registry to put particular emphasis on “the need to respect local tradition.”²⁵² For this reason, the ability “to speak the victims’ language, share their culture and know their realities” was considered to be crucial for representation “*to be more meaningful*”.²⁵³ The Chamber is of the view that:

“such an approach could facilitate communications between the common legal representatives and the represented victims. This should further ensure that the victims’ views and concerns are effectively transmitted to the parties and the Chamber during the trial proceedings.”²⁵⁴

Since the decision was taken only shortly before the commencement of the trial, the Chamber considered that the “views of each victim on such issue can only be taken into account to the extent possible.”²⁵⁵ In addition the Chamber referred to rule 90 (5) RPE and the possibility of a common legal representative being chosen by the court. Victims who are dependent on financial assistance only “have limited freedom of choice to select their own legal representative.”²⁵⁶ Given the envisaged time constraints, the Chamber considered it unlikely that all victim participants could

²⁵⁰ Trial Chamber III, Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005.

²⁵¹ Ibid., para. 9.

²⁵² Trial Chamber III, Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005, para 11.

²⁵³ Ibid., para 11.

²⁵⁴ Ibid., para. 11.

²⁵⁵ Ibid., para, 14.

²⁵⁶ Ibid., para. 16.

be asked individually whether they would agree or not to common legal representation as foreseen in an application form of the VPRS.²⁵⁷ With regard to the role of the OPCV, the Chamber held that it is primarily

“to assist the legal representatives of victims rather than representing individual victims in court. [...] It is only “where appropriate” that the OPCV may appear before the Chamber, and solely “in respect of specific issues”. This restrictive wording supports the interpretation according to which the OPCV should not act, in principle, on behalf of individual victims.”²⁵⁸

This is remarkable given the changing jurisprudence hereon, which will be elaborated in the next sections.

1.2.3. Banda/Jerbo: Prelude

The Banda and Jerbo case is discussed as one of the turning points in the practice of legal representation concerning the Registry’s approach to common legal representation and consultation with participating victims.²⁵⁹

During the Pre-Trial Phase the applicants for participation were represented by six external counsels of their own choice.²⁶⁰ However, already before the case being accepted for trial, the Prosecution and the Defence in the case objected to two legal representatives, holding that their proximity to the Sudanese government, and more particularly to President Al Bashir, suggests that the

“counsel may be intending to use these proceedings, despite its repeated failed attempts, as a vehicle to express the views of the Government of the Sudan (“GoS”) and its President, who is currently refusing to recognize the authority and jurisdiction of this Court.”²⁶¹

²⁵⁷ Ibid., para. 17.

²⁵⁸ Ibid., para. 29.

²⁵⁹ See, REDRESS; Representing Victims before the ICC: Recommendations on the Legal Representation System, April 2015, <http://www.redress.org/downloads/publications/1504representingvictims.pdf>, last accessed 02.02.2017; Edmunds and Haslam (2012).

²⁶⁰ Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, 29 October 2010, ICC-02/05-03/09-89.

²⁶¹ Office of the Prosecutor, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Objection to the Continued Representation of Victims a/1646/10 and a/1647/10 by Messrs Geoffrey Nice and Rodney Dixon, 6 December 2010, ICC-02/05-03/09-110, paras. 2-3; Defence, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Application to restrain legal representatives for the victims a/1646/10 & a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries, 6 December 2010, ICC-02/05-03/09-113.

For the Trial Phase, the Chamber ordered the Registry to start consultations on the organization of common legal representation. After consultations with the Registry, the former legal representatives of participating victims submitted joint observations on this matter.²⁶² They proposed an own approach to legal representation in the case, involving three groups of victims, taking into consideration the distinct interests of the victims and the views expressed by them on their priorities regarding representation. These three teams of representatives proposed to work together to ensure that the interests of victims are commonly represented, sharing time allocated for them in court, pages for submissions, etc. Thereby, no extra time would be needed. Furthermore, they submitted that only two teams needed legal aid.²⁶³

Referring to the instructions by the Chamber to finalize the consultation process and inform the Chamber of the common legal representative, the Registry then submitted a report and a proposal.²⁶⁴ According to the Chamber's instructions, the Registry should either inform the Chamber of the common legal representative chosen by the victims, or alternatively, in case the victims are unable to choose a common legal representative, to submit an own proposal. In the respective report it is submitted that, although the Registry has not been able to meet directly with victims, they were unable to choose representation, wherefore the Registry asked for an extension of time limit for its own proposal.²⁶⁵ The reasoning for this argumentation is twofold. On the one hand, the Registry argues that, without assistance, victims are often not able to agree on common legal representation and that given the inability of the Registry to provide the needed assistance in this case,

²⁶² Victims' Legal Representatives, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Joint Observations of Victims' Legal Representatives on Common Legal Representation, 18 July 2011, ICC-02/05-03/09-182.

²⁶³ Ibid., para.15.

²⁶⁴ Victims' Legal Representatives, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Joint Observations of Victims' Legal Representatives on Common Legal Representation, 18 July 2011, ICC-02/05-03/09-182.

²⁶⁵ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Report on the organization of common legal representation, 5 August 2011, ICC-02/05-03/09-187; Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203.

²⁶⁵ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Report on the organization of common legal representation, 5 August 2011, ICC-02/05-03/09-187.

due to limited resources and time, the victims were unable to choose.²⁶⁶ On the other hand, it is alleged that the joint observations on common legal representation submitted by the former legal representatives of the participating victims cannot be regarded as an agreement among the victims themselves. Explaining that

“this proposal emanates not from the victims themselves but from the current legal representatives of the victims. [...] Moreover, the document does not detail the views expressed by the victims themselves or the circumstances in which they might have been provided to the lawyers.”²⁶⁷

For these reasons, the Registry submits its own proposal based on rule 90 (3) of the RPE. On this occasion, it summarized the practice of organizing common legal representation hitherto and developed recommendations for the present case and for further proceedings.

1.2.4. Excursion: Registry report on the organization of common legal representation

The development of the so called new approach is divided into three parts, the legal framework, the practice to date and finally the recommendations. Generally, the Registry endorses an open and transparent selection of legal representatives. Referring back to Trial Chamber II in Katanga, reminding the Chamber of the principal behind the organization of common legal representation, which is to “reconcile the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation...”²⁶⁸ Against this backdrop, it is acknowledged that in principle, according to the legal framework provided for in rule 90 RPR, priority is given to victims’ own proposal for legal representation.

“However, given logistical and security considerations, it is apparent that in practice a proposal is likely to be made by victims only rarely, and then only if the Registry is in a position to provide significant assistance. It is perhaps in recognition of this reality that rule 90 enables the Chamber to recognize that victims are unable to choose a common legal representative, and thus requests the Registry to do so.”²⁶⁹

²⁶⁶ Ibid., paras 2-3.

²⁶⁷ Ibid., para. 5.

²⁶⁸ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203, para. 3, and Annex 1, para 2.

²⁶⁹ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203, para. 4.

Anticipating and suggesting that this will become the rule, despite the different structure of rule 90 RPE, the Registry submits their new approach. Reconsidering the former approach which favored counsel that were already active in the case, meaning, counsel who were already representing victims in the case, the Registry concludes that this should only be one criterion among others. Given that it would “tend to reward and encourage the practice among counsel of “fishing for victim clients”.²⁷⁰ In this respect,

“[Q]uestions may be raised as to whether the victims have had a real, informed choice about their representation. Furthermore, they are likely not aware of other options for legal representation and can be ill-equipped to assess the relative skill and professionalism of the lawyer contacting them as compared with others. While lawyers involved in this practice might sometimes have qualities which are desirable in a victims’ legal representative, this is not necessarily the case.”²⁷¹

The new approach, also applied in the Kenyan cases, should promote the best quality of victim representation before the court.²⁷²

First, the Registry, according to rule 90 (4) RPE develops recommendations with respect to the number and composition of victim groups. The Registry notes that of course there are a variety of different interests among victims and seeks to identify those which are substantial enough to justify separate representation.²⁷³ Therefore it differentiates between conflicting and distinct interests as provided for in rule 90 (4) RPE. In the present case it does not see any conflicting interests and only discusses distinct interests. In the latter case, it holds that the interests must be substantially different to justify separate representation. Typical distinct interests may arise because of a different harm from which the individual victims suffered. Hereon,

“[T]he Registry considers it inevitable that cases before the Court will involve victims who have suffered various forms of harm. This does not of itself mean that the victims have different interests. Where the victims’ interests relate

²⁷⁰ Ibid., para. 8.

²⁷¹ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203-Anx1, fn 8.

²⁷² Ibid., para. 11.

²⁷³ Ibid., para. 2.

principally to a desire for justice and/or reparations, these interests may substantially coincide.”²⁷⁴

Another distinct interest of victims, which, according to the Registry was often voiced by the victims wanting to participate is to be represented by a person from their country, speaking the language.²⁷⁵

“The Registry understood these requests to stem above all from a desire to achieve mutual understanding and good and regular communication. The Registry considers this to be an important goal, but one which could be achieved through ensuring a legal team with multiple members which includes different languages and countries of origin in composition. The Registry has not received information from the victims or from the legal representatives suggesting that such an approach would not meet their concerns.”²⁷⁶

After discussing the particularities of the present case, which includes concerns to the contrary voiced by legal representatives, the Registry recommends to “arrange one team with sufficient and appropriate members to represent the entire group of victims.”²⁷⁷

This is reflective of a general view advocated by the Registry, that there are considerate advantages of minimizing group numbers and arranging victim participation and representation through as few groupings and corresponding legal teams as appropriate.²⁷⁸ Given concerns raised with regard to lacking procedures of consultation with victim participants on this issue, the Registry contends that this is a problem, especially in the present case, “[H]owever victims’ views as presented to the Registry in previous meetings have been taken into account “.”²⁷⁹

²⁷⁴ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203-Anx1, para. 7.

²⁷⁵ In this regard, the Banda and Jerbo case is special, since victims are coming from different African countries. In all the other cases, victims mostly come from the same country, which does however not necessarily mean that they have the same first language.

²⁷⁶ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203-Anx2, para. 8.

²⁷⁷ Ibid., para. 15.

²⁷⁸ Ibid., paras 4, 6.

²⁷⁹ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203-Anx2, para 5; what is meant with previous meetings is not clarified. Generally, it is likely that this refers to the meetings around distribution/filling in/and collection of the application forms. See also, Edmunds and Haslam (2012).

In the next step, the selection criteria and the respective weight accorded to them are outlined and discussed. Beyond the minimum criteria laid out in Rule 22 RPE which primarily apply to the defense counsel, the Registry takes into account what they consider to be the particularities of victim representation and participation.²⁸⁰ Concerning the criteria considered, whilst acknowledging the exceptionality of the situation where the victims being granted participatory rights already established a relationship of trust to a legal representative, the Registry urges to not put undue weight on such a relationship because this could be detrimental to other important and desirable characteristics. With that said, the extent to which the present legal representative is better placed than others is taken into account concerning a trust relationship and familiarity with the case in question, but other factors will equally be applied. The information used to check the criteria, is

“the counsel’s interventions in the proceedings, including compliance with ICC procedures, communication with their clients, communication with the Court, submissions filed, appearances at hearings. As far as possible from the information available, the extent and nature of interactions with represented victims should also be assessed. Ideally this should also involve the receipt of victims’ views regarding their representation to date, however it is recognized that such views are difficult to obtain without direct and private interactions between the Registry and victims, which may not always be possible.”²⁸¹

The procedure subsequently applied is to assess applications by counsel who are interested and available and produce a shortlist of candidates who are then asked to answer a set of questions. Based on the results an interview panel is created, composed of Registry staff from the VPRS and the Counsel Support Section. This panel eventually makes recommendations.²⁸²

²⁸⁰ Registry, Situation in Darfur, Sudan in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203-Anx1, para. 13.

²⁸¹ Registry, Situation in Darfur, Sudan in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203-Anx1, para. 16.

²⁸² Registry, Situation in Darfur, Sudan in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203-Anx1, para.13.

For the Banda and Jerbo case this meant that the Registry recommended that the victims participating should not be divided into groups, but be represented by one team that is sufficiently equipped to represent the entire group of victims.²⁸³

1.2.5. Banda/Jerbo: The struggle

The Registry's recommendation caused opposition among the currently representing counsel of victims. In a joint observation they clarified the position of the participants they are representing and their bewilderment about the new approach taken by the Registry.²⁸⁴ They alleged that none of the participants has been consulted prior to the filing of the recommendations. Given this lack of consultation with victims they emphasize the procedure foreseen in rule 90 RPE, namely the prerogative of a choice made by the victims themselves before the Registry may propose a common legal representative.²⁸⁵ In a second observation they respond to the allegations made by the Registry that the submissions by the legal representatives concerning the choice of legal representation did not actually represent the views and concerns of the represented victims.²⁸⁶ They question the basis for this assumption, especially against the background of the admitted fact that participating victims themselves could not be consulted on this issue.²⁸⁷

²⁸³ Ibid., para.15.

²⁸⁴ Legal Representatives of Victims, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Joint Observations of Victims' Legal Representatives on Common Legal Representation, 18 July 2011, ICC-02/05-03/09-182 and Victims' Legal Representatives, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Joint Observations on the Registry "Report on the organisation of legal representation" and Request for Joint Agreement on Common Legal Representation to be adopted pursuant to the Trial Chamber's Order, 22 August 2011, ICC 02/05-03/09-200.

²⁸⁵ Victims' Legal Representatives, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Joint Observations of Victims' Legal Representatives on Common Legal Representation, 18 July 2011, ICC-02/05-03/09-182 and Victims' Legal Representatives, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Joint Observations on the Registry "Report on the organisation of legal representation" and Request for Joint Agreement on Common Legal Representation to be adopted pursuant to the Trial Chamber's Order, 22 August 2011, ICC 02/05-03/09-200.

²⁸⁶ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Report on the organization of common legal representation, 5 August 2011, ICC-02/05-03/09-187, para.5.

²⁸⁷ Victims' Legal Representatives, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Joint Observations on the Registry "Report on the organisation of legal representation" and Request for Joint Agreement on Common Legal Representation to be adopted pursuant to the Trial Chamber's Order, 22 August 2011, ICC 02/05-03/09-200, para.2.

The LRVs selected by the Registry, who initially submitted their views in the joint submission discussed, now that they were appointed by the Chamber, submitted new observations in response to the request for reviewing the proposed appointment of legal representatives.²⁸⁸ They allege that, with the exception of the two legal representatives of the participating victims from Darfur, all former legal representatives transmitted their files and assisted in the transfer of their clients. Concerning the argument made by the respective legal representatives that the participants from Darfur have distinct interests. They submit that, from a legal perspective, the interests are neither conflicting nor separate, “since the aim to seek redress for harm caused by one and the same attack, and to demonstrate that the attack was illegal and a war crime” is common to the victims who are only granted participatory status because they suffered harm from the same attack.²⁸⁹ According to the newly appointed common legal representative, the joint observations submitted before

“underscored the wish to have taken into account the close cultural and social links which had been forged between those representatives and the victims over the course of two years, but did not highlight conflicts of interest between the various victims in their aim to obtain reparations and to see those responsible for the war crimes at the root of their suffering face international justice.”²⁹⁰

In a further step, it is argued that the fact that all other victims participating accepted the new LRVs shows that rule 90 (1) RPE should not be considered absolute and could be consistent with rule 90 (2) and (3) RPE.²⁹¹ According to the observation, a close reading of the statements made by the two victims from Darfur “causes puzzlement and casts doubt on their credibility and probative value in that it raises questions as to whether they are the genuine, direct and totally uninfluenced

²⁸⁸ Common Legal Representative of Victims, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Observations in response to the request for review of the proposed appointment of common legal representation, 12 October 2011, ICC-02/05-03/09-230-tENG.

²⁸⁹ Ibid., paras 24-27.

²⁹⁰ Common Legal Representative of Victims, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Observations in response to the request for review of the proposed appointment of common legal representation, 12 October 2011, ICC-02/05-03/09-230-tENG, para 30. Interestingly the new common legal representative was among the former representative signing the joint observations.

²⁹¹ Common Legal Representative of Victims, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Observations in response to the request for review of the proposed appointment of common legal representation, 12 October 2011, ICC-02/05-03/09-230-tENG, para 32.

expressions of the victims themselves.”²⁹² Given the background of the main intermediary who assisted the victims to draft the English statements, the common legal representatives doubt that there was no pressure on the victims to sign.²⁹³

1.2.6. Banda/Jerbo: The decision

The final decision taken by the Trial Chamber in the case mainly endorsed the Registry’s new approach.²⁹⁴ Re-interpreting rule 90 RPE, it re-emphasizes that the rule does not contain an absolute right to be represented by a legal representative of one’s choice. The contextual and literal interpretation showed that it has been drafted in a sequential manner. Once the Registrar acts under rule 90 (3) RPE, the choice is with the Registry and not with the participants any more.²⁹⁵ The question at hand in the present case is, whether the Registrar acted in violation with rule 90 RPE in proposing a common legal representative, while disregarding the proposal made by the former legal representatives. In conclusion, the Chamber holds that it was a mere proposal and as such not binding to the Registry, which in turn was legitimately applying their own criteria, which have been fully endorsed by the Chamber.²⁹⁶ The Chamber does not address whether, given the proposal of the legal representatives of the victims, the Registry could legitimately assume that the victims were unable to choose. In the following elaborations, it goes on discussing whether the Darfuri victims have distinct interests that render separate representation necessary, which is denied.²⁹⁷ In a last step the lack of any direct consultation with the respective victims concerning their distinct, or conflicting interests is addressed, which, according to their former representatives would amount to a violation of regulation 79(2) RoC. Declaring that a consultation process does not mean that the wishes will be satisfied, the Chambers concludes that

“the absence of “direct” consultation with the victims was not prejudicial to the two victims as their views were largely conveyed through their legal representatives. The Chamber is persuaded that these views will continue to be

²⁹² Ibid., para 34.

²⁹³ Ibid., para 35.

²⁹⁴ Trial Chamber IV, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on common legal representation, 25 May 2012, ICC 02-05/03/09-337.

²⁹⁵ Ibid., para. 14.

²⁹⁶ Ibid., paras.24-25.

²⁹⁷ Trial Chamber IV, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on common legal representation, 25 May 2012, ICC 02-05/03/09-337, paras 26ff.

appropriately expressed through the Appointed Legal Representatives, who will act in accordance with the Code of Conduct to best serve the interests of their clients.”²⁹⁸

It is unclear, why for the purpose of determining whether the participating victims have distinct or conflicting interests, the submissions by the legal representatives suffice to express the views and concerns of the victims, while the proposals made by the same representatives do not express the genuine views and concerns of the victims with regard to the choice of legal representation. Why despite the joint observations of the legal representatives proposing a mode of representation, the Registry legitimately assumes that the victims were unable to agree on common legal representation.

Finally, the two former legal representatives filed an application for leave to appeal the decision of the Trial Chamber pursuant to article 82(1)(d) RS, rule 155 and regulations 33 and 65 RPE. Since this right to seek leave to appeal a decision is exceptional and not designated for victims, they had to demonstrate that the impugned decision “would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeal Chamber may materially advance the proceedings.”²⁹⁹ The Chamber rejecting the leave to appeal simply held that the former legal representatives have no standing to seek leave to appeal, since they are no party to the proceeding and that their submissions do not meet the requirement that the decision significantly affects the fair and expeditious proceedings.³⁰⁰

1.2.7. Kenya: Mixed approach

The Kenya Pre-Trial and Trial Phase is reflective of the above outlined new approach of the VPRS to impose common legal representation on victims and the opposition this caused among participants who were already represented by lawyers

²⁹⁸ Trial Chamber IV, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on common legal representation, 25 May 2012, ICC 02-05/03/09-337, para 50.

²⁹⁹ Victims represented by Sir Geoffrey Nice QC and Rodney Nixon, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Application for Leave to Appeal the “Decision on common legal representation” pursuant to Article 82 (1)(d), 30 May 2012, ICC 02/05-03/09-339, para. 2.

³⁰⁰ Trial Chamber IV, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on the application for leave to appeal the “Decision on common legal representation”, 13 July 2012, ICC 02/05-03/09-367.

of their choice. It is illustrative of decisions taken at The Hague without any consultation with the affected victims and even more so, against the explicit wish of the participating victims. In bypassing rule 90 RPE, and directly referring to regulation 80 of the RoC, the Chambers in both Ruto and Sang and Kenyatta et al. thereby avoided the procedure of consultation with participating victims foreseen in the RPEs altogether.³⁰¹

Participants, in the Pre-Trial Phase have already appointed lawyers of their choice to represent them during the proceedings. Nevertheless, the Single Judge, referring to

„the number of victims admitted as participants in the present proceedings and with the view to ensuring meaningful victims' participation as well as fairness and expeditiousness of the proceedings, is of the opinion that common legal representation should be provided for the victims hereby admitted as participants and that all of them should be represented by a single common legal representative“³⁰²

The Pre-Trial Chamber, following the submissions of the Registry argued that although continuity of legal representation is one criteria for the selection of legal representation, it is one among others and in the present case, the others outweighed continuity. It referred to criteria developed by the VPRS in its report on the new approach going beyond the legal requirements, based on previous experience and jurisprudence:

„First, the candidate "should demonstrate an established relationship of trust with the victims or the ability to establish such a relationship". In considering this criterion, the Registry has taken into account whether a candidate: (i) already represents the victims in the case or in the situation at stake; (ii) has an engagement with victims in other fora; (iii) is known to the victims as a human rights advocate or a community leader; (iv) shares cultural, ethnic, linguistic heritage with all victims, or part of them; and (v) will enable victims to speak frankly about the crimes experienced.“³⁰³

Endorsing these criteria the Pre-Trial Chamber decided that

³⁰¹ See, a very critical review of the representational system: REDRESS; Representing Victims before the ICC: Recommendations on the Legal Representation System, April 2015, p. 12. <http://www.redress.org/downloads/publications/1504representingvictims.pdf>, last accessed 02/02/2017.

³⁰² Pre-Trial Chamber II, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 5 August 2011, ICC-01/09-01/11-249, para 65.

³⁰³ Pre-Trial Chamber II, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 5 August 2011, ICC-01/09-01/11-249, para 69.

"the benefits of continuity of representation are minimal in respect of the existing private legal representatives in the present case", since the Registrar is not convinced either (i) that "the current legal representatives have established meaningful relationships of trust with significant number of their clients" or (ii) that "counsel's representation to date in this case indicates a particular familiarity with ICC proceedings".³⁰⁴

On the basis of the criteria the Registry conducted a selection process that did not imply consultation with victim. The process is comprised of:

„(i) a request for expression of interest sent to the lawyers on the Registry's list of counsel; (ii) an initial review of the candidates who provided the information requested; (iii) an evaluation of written answers to questions on the proposed approach towards legal representation of victims; and (iv) a telephone interview.“³⁰⁵

In a request to reconsider the appointment of common legal representation in the case, the former lawyers submitted that the represented victims do not agree to being represented by the selected candidate, who was imposed on them. Moreover, they emphasize that the motion contains the views and concerns of the victims represented and “is not just the result of an agreement between them and the legal representatives that have worked with them”.³⁰⁶ The participating victims complained that they were at no point in time consulted and that the procedure culminating in the decision to appoint remained obscure to them.³⁰⁷ This led to a situation where neither the LRV knows the participants nor the participants know who is to be representing them. Given the short time left before the Confirmation of Charges hearing (three weeks), it is impossible to build a relationship of trust which in turn renders a *meaningful* representation impossible.³⁰⁸

³⁰⁴ Ibid., para 75.

³⁰⁵ Ibid., para 76.

³⁰⁶ See, Pre-Trial Chamber II, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Motion from Victims a/0041710, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta CHANA for All Victims, 31 August 2011, ICC-01/09-01/11-314, paras. 5-6.

³⁰⁷ Pre-Trial Chamber II, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Motion from Victims a/0041710, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta CHANA for All Victims, 31 August 2011, ICC-01/09-01/11-314, paras 11-12.

³⁰⁸ Ibid., para. 13.

Beside the issue of representation itself, the victims were of the opinion that they were deprived of their right to request a review of the legal representative chosen for them, provided for in 90 (3) RPE. The decision on this request was filed after the confirmation of charges hearing already took place, therefore the decision on who speaks legitimately for the participating victims at this central stage of the proceedings was factually taken before.³⁰⁹ In the respective decision on the bespoken motion, the Pre-Trial Chamber then replies that since the decision to appoint the common legal representative was based on regulation 80 (1) RoC and not on rule 90 RPE, no possibility of seeking review is foreseen.³¹⁰ Also, the Chamber throughout the decision contends that “the victims allegedly oppose” the common legal representative appointed, implying that the legal representatives are not speaking on behalf of the victims, despite the fact that signed declarations are annexed to the motion.

„The Applicants attached four annexes containing declarations signed by victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10, in which these victims allegedly oppose the appointment of Ms. Chana as their legal representative.“³¹¹

In response to the lawyers’ request on behalf of their clients to express views and concerns in person, when there is no decision on legal representation, or when they are still not willing to be represented by the foreseen candidate, the Single Judge holds that,

³⁰⁹ The Single Judge somewhat sarcastically states in the last paragraph, that „*Lastly, since the confirmation of charges hearing in the present case is over, the Request for Postponement becomes moot.*“, Pre-Trial Chamber II, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on „Motion from Victims a/0041710, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta CHANA for All Victims“, ICC-01/09-01/11-330, 9 September 2011, para. 19. In fact, against this backdrop to a certain extent most of her decisions are practically moot, nevertheless this demonstrates clearly how the efficiency of the proceedings is overwhelming even the most fundamental issues of legal representation.

³¹⁰ Ibid., para 15.

³¹¹ One of the indications for this allegation is that two of the victims already met with the „new legal representative“ in the presence of the „old“ one before the motion was submitted and that in the motion they then state that they never have seen the „new“ representative. Pre-Trial Chamber II, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on „Motion from Victims a/0041710, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta CHANA for All Victims“, ICC-01/09-01/11-330, 9 September 2011, paras 5,16.

„the Statute provides that any views and concerns that the victims can have may be presented by the legal representative. The Single Judge considers that, unless otherwise decided, the legal representative of the 327 victims admitted to participate in the present case is and remains Ms. Chana. Accordingly, the views and concerns that any of these victims may wish to express may be exclusively presented through Ms. Chana. Thus, the Request for Expression of Views and Concerns is also rejected.“³¹²

In fact, given a second change in representation ordered by the Trial Chamber, this decision on the motion after the Confirmation of Charges Hearing took place was only manifesting legally, what has already been decided practically. Namely, these participants could neither chose representation, nor were they asked whether they agreed, and when they made their dissenting view explicit (through other representatives) it was not believed that this was their view and decided otherwise. Even the wish to not being represented by the common legal representative in the case was denied.

When the cases moved to Trial, the LRV was again replaced, a completely new model was applied and once again, participants were not consulted beforehand. In the initial decision on victim representation and participation during Trial, the Trial Chamber listed the requirements applied by the other Chambers:

„(a) the need to ensure that the participation of victims, through their legal representative, is as meaningful as possible, as opposed to purely symbolic; (b) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial; (c) the Chamber's duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity; and (d) the Chamber's obligation under Article 68(3) of the Statute to ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.“³¹³

Against the backdrop of these requirements, the Chamber found it necessary for the LRV to be based in Kenya. They believed that the geographic proximity enhances communication between the LRV and his/her clients. In order to practically implement this, the Chamber decided that,

„the OPCV will, as stated above, be permitted to attend all hearings in which victims are allowed to participate. It will be the responsibility of the OPCV to

³¹² Ibid., para 18.

³¹³ Trial Chamber V, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-01/11-460, para 59.

communicate with the Common Legal Representative, who will instruct the OPCV to make submissions on his or her behalf.”³¹⁴

Thereby an entirely new model was created, with the principal counsel being based in Nairobi and the OPCV being representative in the courtroom at The Hague. Only at central stages of the proceedings, f.e. opening and closing statement, the lead counsel is allowed to address the court at The Hague. The former common legal representative refused to relocate to Kenya and submitted that she could nevertheless carry out her duties appropriately.³¹⁵ Regardless of the submissions by the VPRS and the OPCV, the Chamber, Judge Eboie-Osuji dissenting³¹⁶, decided that the requirement to be located in Kenya is crucial and that given the unwillingness of the former legal representative, a new LRV is appointed to represent the participating victims.³¹⁷ The Chamber repeatedly states, that this is in the best interest of the participating victims without having consulted with said victims in advance.³¹⁸

Against the background of the modified application system described above in combination with this model of representation applied without further consultation, the Kenyan model is one of the most externalized and collectivized representational practice. The LRV, who was not chosen, represents all victims, registered or not, as participating victims. For most of the time this external LRV is not present in the courtroom, while the counsel from OPCV are in the courtroom, but hardly ever directly meet the victims they represent. Furthermore, the voices of those victims who do not register “shall nevertheless be voiced, in a general way, through common legal representation.”³¹⁹

³¹⁴ Ibid., para 60.

³¹⁵ Trial Chamber V, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision appointing a common legal representative of victims, 23 November 2012, ICC-01/09-01/11-479, para 4.

³¹⁶ Judge Eboie-Osuji valued continuity over proximity.

³¹⁷ Trial Chamber V, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision appointing a common legal representative of victims, 23 November 2012, ICC-01/09-01/11-479, paras 6-7.

³¹⁸ Ibid., para 8.

³¹⁹ Trial Chamber V, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-01/11-460, para 52.

1.2.8. Gbagbo/Ntaganda - OPCV as LRV

Another practice developed is to appoint a counsel of the OPCV to be the LRV of participants in a case pursuant to rule 80 (2) RoC.

The approach of the Registry before making its proposal to the Pre-Trial Chamber basically reflects the new approach, described previously. As a result,

“[T]he Panel recommended, inter alia, the name of principal counsel and identified a person of Ivorian nationality as a suitable candidate to be the team member based in the field. With respect to the latter, the Panel submitted that this counsel had demonstrated a "strong understanding of the case as well as of the local political context", concluding that this person would have the capacity to provide the Lead Counsel with "first-hand experience of the local context and a capacity to rapidly obtain the trust of victims in the case." The Registrar indicated that the costs of the proposed common legal representative would likely rely on the Court's legal aid scheme under rule 90(5) of the Rules.”³²⁰

Concurring with the Registry on the proposed team structure (lead counsel, field assistant and case manager) and endorsing the criteria applied, the Single Judge, however, given the short time remaining before the confirmation of charges hearing, decided to apply rule 80 (2) RoC. In this context, the Single Judge appoints the OPCV as principal counsel with experience and expertise of proceedings before the Court and a field assistant, paid from the legal aid fund, who “would provide the Principal Counsel with valuable complementary experience and expertise that will be required for the representation of victims in the case, and in particular the capacity to rapidly become familiar with the team's clients' circumstances and views.”³²¹

According to the Single Judge “this is the most appropriate and cost effective system at this stage as it would enable to combine understanding of the local context with experience and expertise of proceedings before the Court, without causing undue delay in the case at hand.”³²²

³²⁰ Pre-Trial Chamber I, Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Laurent Gbagbo, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, para. 39.

³²¹ Ibid., paras 43-45.

³²² Pre-Trial Chamber I, Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Laurent Gbagbo, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, para 45.

The system though may be revisited at a later stage in light of the views and concerns of victims.³²³ Thereby, for the first time, the Pre-Trial Chamber only partly adopts the proposal of the Registry and applies rule 80 (2) RoC appointing the OPCV as an ICC-based counsel for the common legal representation of participating victims.

In the Trial Phase the cases of Laurent Gbagbo and Charles Blé Goudé were joined. Since in both cases the same approaches to common legal representation were taken (the same victims were granted participatory status), for the purpose of deciding on this issue the joinder did not have any relevance. In the requested report and proposal by the Registry, it recommends the continuation of the combination of OPCV and field assistant based in Abidjan, since 91 % of the victims consulted expressed a respective wish.³²⁴ The OPCV submitted information on the precedent communication with participants in the cases.³²⁵ And finally, the Trial Chamber approved of this model and appointed the OPCV as principal counsel in the Trial Phase, it finds that “[U]nder these circumstances, [...] the current system meets all of the requirements for effective and fair representation of victims, and decides that it should be maintained during trial proceedings.”³²⁶

In Ntaganda, the Pre-Trial Chamber asked the Registry from the beginning to take the OPCV as possible common legal representative into account when consulting with victims and making a proposal. Accordingly, the Registry while pointing at 213 applicants who attached power of attorney for six lawyers to their application, recommends to consider the distinct interests of the group of former child soldiers and the victims of the child soldier’s attacks and form two groups commonly represented by two legal representatives.³²⁷ The OPCV submits that they

³²³ Ibid., para 45.

³²⁴ Registry, Situation in the Republic of Côte d’Ivoire in the case of the Prosecutor v. Laurent Gbagbo, “Report on the Legal Representation of Victims for the Purpose of the Trial pursuant to Decision ICC-02/11-01/11-800”, 30 April 2015, No. ICC-02/11-01/15-49-Conf-Exp.

³²⁵ OPCV, Situation in the Republic of Côte d’Ivoire in the case of the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Information on Common Legal Representation of Victims in the proceedings, 15 May 2015, ICC-02/11-01/15-53-Red.

³²⁶ Trial Chamber I, Situation in the Republic of Côte d’Ivoire in the case of the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15-205, para 70.

³²⁷ Pre-Trial Chamber II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda, Decision Concerning the Organization of Common Legal Representation of Victims, 2 December 2013, ICC-01/04-02/06-160, paras. 10-14.

can constitute two distinct legal teams lead by principles counsels from their office.³²⁸ In her analysis the Single Judge comes to the conclusion that there are diverging views among victims with regard to legal representation and that none of the victims who have expressed preferences for lawyers have not indicated if they would pay for them. Hence, she assumes that these victims would rely on the legal aid scheme of the court, which in turn lead her to “to appoint, pursuant to regulation 80 of the Regulations, two counsel from the OPCV as common legal representatives of the two groups of victims that will be admitted in due course.”³²⁹ Again they are supported by a local field assistant.

The Trial Chamber then reconsidered common legal representation balancing the need to be familiar with the case with the preference of a Congolese lawyer for reasons of proximity to the victims.

“In this regard, it considers that proximity to the victims does not necessarily require physical proximity. Any counsel representing victims should have knowledge of the victims' culture, the context in which the alleged crimes took place (i.e. the armed conflict) and - in order to assess the impact of the alleged crimes on the individual victims - also the circumstances in which the victims live.”³³⁰

Accordingly, the majority found that the counsels of the OPCV have proven a high degree of understanding of the situation on the ground and of the needs of victims in general and sees no reason for changing the system of common legal representation.³³¹ Judge Ozaki dissented to this decision, her argumentation will be addressed later on.

1.2.9. Ongwen: The compromise: OPCV or External legal representation?

In the recent decisions on victim participation and representation the tension between the external LRVs and “in house” representation culminated in an éclat. Organized victims in Uganda chose external counsels and the latter requested to be

³²⁸ Ibid., para 14.

³²⁹ Ibid., para 25.

³³⁰ Trial Chamber VI, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda, Second decision on victims' participation in trial proceedings, 16 June 2015, ICC-01/04-02/06-650, para 28.

³³¹ Trial Chamber VI, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda, Second decision on victims' participation in trial proceedings, 16 June 2015, ICC-01/04-02/06-650, paras. 29, 31, 32.

appointed by the Pre-Trial Chamber in the case against Ongwen. The Single Judge decided that the participants may be represented by the two counsels and appointed the OPCV to represent the yet unrepresented victims who were admitted to participate. At the same time, it was decided that the expenses for legal representation are not covered by the legal aid scheme, since the counsels were not appointed by the Chamber, and Rule 90 (5) RPE only refers to representatives chosen by the Court. Those victims who depend on legal aid have to join the victims who are represented by the OPCV, since they were chosen by the Court and hence all expenses are covered.³³² De facto this would have meant that almost all victims would have to change legal representation. Predictably, this caused strong resistance by victims NGOs who wrote a letter to the court, calling upon the Registrar's prerogative to decide on legal aid for victims and to reconsider to appoint the counsels according to the victims' choice.³³³ Trial Chamber IX subsequently issued a decision confirming the Pre Trial Chamber's ruling³³⁴, emphasising that underlying tension within victim participation is regulated through rule 90:

„Indeed, different policy considerations underlie the scheme established by Rule 90 of the Rules which is intended to provide a balance between the victims' right to choose their own legal representative(s), on the one hand, and the effectiveness of the proceedings and cost containment, while preserving victims' participatory rights before the Court, on the other hand.“³³⁵

Finally, the decision remained with the Registrar, who may „decide on its own the LRVs' further request for legal assistance paid by the Court according to Regulation 85(1) of the Regulations.“³³⁶ Which he subsequently decided to do. This decision finally put an end to the discussion through a compromise. The Chamber did not change its jurisprudence but directed the Registry to decide with regard to legal aid.

³³² Trial Chamber IX, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Decision on Requests Concerning Organisation of Victim Representation, 17 June 2016, ICC-02/04-01/15-476.

³³³ <http://www.redress.org/downloads/publications/1611letter%20registrar.pdf>, last accessed, 30/01/2017.

³³⁴ Trial Chamber IX, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Decision on Requests Concerning Organisation of Victim Representation, 17 June 2016, ICC-02/04-01/15-476.

³³⁵ Trial Chamber IX, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims, 26 May 2016, ICC-02/04-01/15-445, para. 12.

³³⁶ Trial Chamber IX, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Decision on Registry's Request for Clarification on the Issue of Legal Assistance Paid by the Court for the Legal Representatives of Victims, 14 November 2016, ICC-02/04-01/15-591, para. 3.

Nevertheless, the problematic tension that is underlying the mantra-like appeal to *meaningful and effective* victim representation at the ICC, while practically turning Rule 90 RPE upside down, is not solved. Reversing the logic of Rule 90 RPE while still appealing to meaningful representation, when meaning was initially attached to individual choosing of one's LRV, is once again reflective of the obscuring of the silencing effects of the decisions taken.

1.3. Collectivisation, representation and externalization

The developments in the practice of legal representation vividly reflect the problematic of the institutionalization of victim representation. Firstly, it shows how the tension between *meaningful and effective* is negotiated and filled with meaning, while also re-iterated almost mantra-like when actually emptying the previously constructed meaning, given the increasing numbers of participating victims and the respective grouping processes. In this vein, the explorations on legal representation are illustrative of the argumentative structure referring to the victims genuine interests - which is in a next step - without consultation - defined by the Registry, the LRVs and the Chambers respectively. Thereby, the notion of *the victims* addressed in the application forms takes shape. Within the negotiations of what is *meaningful and effective* and what the interests of victims are, there is a strong mainstream interrupted by opposition from legal representatives and by the separate opinion voiced by Judge Ozaki.

1.3.1. Representation: who is represented by whom and who decides?

Since legal representation is the rule in the proceedings before the ICC, the legal representatives have a pivotal role as those speaking for victims at The Hague and communicating with participants throughout the proceedings. Therefore, they are situated in between the victims and the court, representing *the victims* at the court and the court vis á vis the individual participating victims. For this reason, it goes without saying that the selection of these legal representatives is crucial within the representational practices of victim participation. As became clear from the foregoing, in theory, victims could choose someone who represents them according to their ideas of how they want to be represented in the legal proceedings. Principally, in a counsel-client relationship, the counsel has to report and consult with the client, thereby the client can ensure that his or her interests are represented

appropriately. Certainly, there is no representational practice that is totally transparent and it is not least the legal language that can never be an exact representation of the voice of the client. Still, in this part I will only address the personal selection of representation that already implies a lot of implicit images of *the victim* and *the proper legal representatives* constitutive of the proper proceedings and the proper outcome of the trials. These implicit images are shaped in the process of negotiating the rule of personal choice provided for in rule 90 (1) RPE (meaningful), with the possibility of choosing for the victims provided for in 90 (3) RPE (effective) against the backdrop of the increasing numbers of victims who apply. As has been shown, the tendency is even to resort to regulation 80 RoC, while still somehow referring to meaningfulness of representation to uphold the fiction of the legitimatizing narratives of victim participation.

The exception to the rule of choosing legal representation is already laid out in the very first decision on legal representation of victims in the proceedings. From then on, this rule was gradually undermined. The Registry propagates an approach where at best one representative can speak for all victims who are granted participatory status in the proceedings. The requirement for this approach to be transparent and meaningful is prior consultation with the victims. Once again, this rule was undermined in different manners with different lines of argumentation, culminating in the reinterpretation of expressly voiced objections by victims, and/or the outright disregard of views and concerns. Generally, participants do not chose who speaks about them in the proceedings before the ICC.

1.3.2. Collectivization: grouping and managing numbers

From the very beginning, the predictable large numbers of participating victims caused the Chamber in Lubanga to indicate that common legal representation will become the rule rather than the exception. For the organization of this common legal representation two main criteria are central to determine how groups are formed, distinct and conflicting interests (see Rule 90 (4) RPE). Deviating from the principle of individual choice and individual representation – collective representation swiftly became the rule, and criteria were developed how grouping should be organized. Following the Registry's recommendations, the starting point is one group of all participants being represented by one LRV. Only if the Chamber is convinced that

there are distinct and conflicting interests among the participating victims, this group is divided. Interestingly, with regard to defining the interests that could be distinct, or conflicting and the reasons for diverging interests, no consultation with the concerned victims themselves is foreseen. The primary indication referred to when deciding whether there are distinct or conflicting interests among the victims is the harm suffered as a result of the crimes. Hence, a decision on the grouping of victims is taken on the basis of the information in the application forms, which was gradually limited. Until now, the only cases where the Registry proposed separate representation for the reason of conflicting interests is former child soldiers and the victims of the crimes allegedly committed by these soldiers. For any other cases, the Registry argues, that given the fact that it is inevitable to have victims participating who have suffered from various forms of crimes, this does not per se constitute a conflict of interest. After all, victims' principal interests are considered to be justice and reparations - regardless of the diverse crimes, contexts, personal situations etc. The legal representatives in Banda and Jerbo similarly held that victims' interests are basically to seek redress for the harm caused and to have the illegality acknowledged thereby supporting the definitions of the Registry and the Chambers.³³⁷ These conclusions are made after a legal analysis, without having spoken to the participants concerned. In this particular case, the participants from Darfur expressly, through their former legal representatives, voiced opposition to being grouped together with all the other victims participating in the case. The argumentation to overrule this opposition is that although a consultation process is principally foreseen and appreciated, this does not imply that the wishes will be satisfied. The Chamber is convinced that the views and concerns can adequately be represented together in a group of victims.³³⁸ Also, when distinct interests are voiced among the group of victims, the legal representatives are obliged to reflect this in their submissions and, in case there is an irresolvable conflict of interest, separate legal representation is provided for. In the latter case, the OPCV represents a group within the group.

³³⁷ Common Legal Representative of Victims, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Observations in response to the request for review of the proposed appointment of common legal representation, 12 October 2011, ICC-02/05-03/09-230-tENG, paras 24-27.

³³⁸ Trial Chamber IV, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on common legal representation, 25 May 2012, ICC 02-05/03/09-337, para 50.

Similarly, in the Kenyan cases, it is assumed that LRV can represent interests “in a general way”³³⁹, implying that the interests of the group of participating victims are basically the same. In the other cases, there was no (visible) opposition to being summarized in one group and represented by one LRV of the OPCV, therefore the exclusionary effects of the decisions, forcing a heterogeneous group of people into one group assuming a common interest, did not appear that obviously.

By way of conclusion, *the victims* are defined by the suffering caused by the crimes tried and remedied at the ICC and grouped accordingly. Also, the justice, victims are allegedly longing for, is the justice provided for in the legal proceedings at The Hague. On the one hand, the possible interests of victims that could be distinct, or conflicting are hereby streamlined to what the court can deliver, which stabilizes the image that the court is bringing justice to victims. On the other hand, victims’ interests are homogenized which perpetuates the developments laid out in the application process. At the same time diverging, or conflicting interests can principally not even be heard, because they were pre-defined in the application forms and no consultation is foreseen. This practice externalizes all complexity and diversity and, as a consequence thereof, the potential for the irritation of the propagated image is reduced.

Obviously, this leads to huge groups of victims being represented by only few persons and in court by one legal representative. The legal representatives are the ones who have to reconcile individuality and collectivity, heterogeneity and homogeneity, complexity and simplicity. They have to organize the transmission of many individual views and concerns in one oral or written submission. When being asked about groups, the sizes of groups and the everyday practice of representation, the legal representatives I interviewed, on the one hand reproduced the image of a homogenous group, while on the other hand pondering about the difficulty of actually getting to know what each individual participant is concerned about. Taking into consideration the possibility to hold individual meetings and group meetings, the

³³⁹ Trial Chamber V, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on victims’ representation and participation, 3 October 2012, ICC-01/09-01/11-460, para 52.

respective organization and preparation and lastly the micro-power processes within the group, which admittedly remained obscure.³⁴⁰

„...at least in our experience, they are normally quite homogenous, uniform I would say in what they are asking.“³⁴¹

„...we travel and we have group meetings with people, because if you represent 20 it is fine, you can have individual meetings, but if you represent hundreds it is a little bit difficult. So, it is sometimes easy to group them depending on events or age. Normally, you do not consult people over 50 years and older together with somebody who is 15. They do not grasp the same concept, they do not have the same way of interacting with you, so you need to be a little bit cautious, when you group them. Normally, what we do is we contact the assistant in the field. The person is briefed and then this person goes back to the victims and then back to us. If there is a specific question some of us travel to the field. It depends also a lot on the capacity of the assistant. We normally tend to recruit someone with a legal background, because of cause this facilitates a lot the communication and the way in which you collect.“³⁴²

“I do not know when you ask me about victim participation it is more the challenges that come to my mind, how are you going to deal with large numbers of victims...how can you assure that they communicate with the court in an effective manner...?”³⁴³

The perception that victims are a homogenous group, is partly due to the undifferentiated legal pre-definition of legitimate interests. Almost every interest voiced by victims can somehow be subsumed under truth, justice and reparations. The perception of victims as homogenous or heterogenous depends decisively on the perspective taken and on the proximity to them. The heterogenous views and concerns are ideally assorted by the field assistants who prepare the meetings before the LRVs talk to their clients.³⁴⁴ Concerning the perspective taken, when hearing participants through the legally pre-defined categories and definitions, for example of distinct and conflicting interests, legal representatives often just reproduced the Chambers ruling:

³⁴⁰ See also, the statements on how group-leaders, spokespersons and intermediaries are selected. Field-notes, 22/3/2014.

³⁴¹ Interview LRV, 16/6/2014.

³⁴² Interview LRV, 16/6/2014. Similarly, Interview LRV, 15/3/2014: “... dass es so viele Opfer sind, dass man gar nicht jeden einzeln ansprechen kann, dass man eben versucht zu rotieren und samples aus verschiedenen Gruppen, die nach Wohnort eingeteilt werden, dass man immer wieder versucht verschiedene Leute anzusprechen und sozusagen rotiert.“ .

³⁴³ Interview LRV, 25/6/2014.

³⁴⁴ A situation that was illustrative of this pre-selection responsibility of Kituo at Nairobi, was, when they were asked to gather victims who can talk about different experiences for a scientific study for which a variety of experiences was crucial. At some point it feels like: “Ordering the right victim”. Field notes, 9/1/2014.

„Because when legal representation is organized, it is to avoid any conflict of interest. The only conflict that could have a reason is, if, for example, victims of the attacks were together with child soldiers, which never happened...they are not mixed. And in any case, they have the same interest. There is no conflict of interest.“³⁴⁵

The argumentation is that, when the ruling of the Chamber, that there is no conflict of interest, was applied, there can be no conflict of interest apart from the legally acknowledged conflict between former child soldiers and victims of the attacks. It seems as if the legal pre-definitions of what distinct and conflicting interests could be strongly influence the perception of legal representatives. They reproduce the image that victims' primary interests are truth, justice and reparations under which almost everything can be summarized. Thereby the legal representatives pre-select and sort out illegitimate interests before they could be represented at The Hague.³⁴⁶ There was a discrepancy between the explanations given with regard to the homogenous interests of victims represented and the descriptions of ways of communication with many participants. The elaborations at first were very clear and convinced, but when asked how communication with victims and individual meetings are actually organized, the explanations got more vague. Some representatives emphasised that they met with each participating victim individually for at least 30 minutes³⁴⁷, when summing up the 30 minutes per victim in the respective case, it became clear that this was impossible within the number of days mentioned. Other representatives admitted that individual meetings were not always possible, only in the course of years, one manages to meet every single participant.³⁴⁸ The prevailing form of organizing contact seems to be group-meetings.³⁴⁹

In conclusion, with regard to defining distinct and conflicting interests among participating victims for the purpose of grouping, the Chambers, the Registry and the LRVs speak *about* victim's interests. Since the interests are pre-defined and assumed

³⁴⁵ Interview with LRV, 19/6/2014; similarly, Interview with LRV, 20/6/2014.

³⁴⁶ This was a common scheme. And if legally illegitimate interests were voiced, they saw their task in explaining the victims what their legitimate interests can be. Furthermore, those interests that could be met by the court are determining the questions asked. When, in a meeting at Kituo we were talking about getting to know the interests of victims, questions were not formulated in an open manner: What are your interests at this point in time? The aim was formulated to be: Empower victims to identify, articulate and express their needs *with regard to their psychological and socio-economic situation*. Thereby, the possible needs are already pre-defined. Field notes, 9/1/2014.

³⁴⁷ Interview LRV, 25/6/2014.

³⁴⁸ Interview LRV, 19/6/2014.

³⁴⁹ Interview LRV, 15/3/2014, Interview LRV, 16/6/2014, Interview LRV, 25/6/2014, Interview LRV, 19/6/2014, Interview LRV, 27/6/2014.

without prior consultation, one can neither say that the legal representatives are speaking for victims, nor the Registry making the suggestions. Through the collectivization of participants into one group, the homogenization of interests fitting the rationale of the Court is facilitated. The practice already inherent in the application forms, namely that the participating victims are not addressed as individuals and always already represented by someone who is speaking about *the victims* is perpetuated in the practice of grouping and defining the respective interests. This is the silencing effect of collectivization within the practice of organizing legal representation.

1.3.3. Externalization: selecting the right representatives

The selection of those who speak for, on behalf, or about large groups of participating victims was until now a controversial process. Considering that legal representation is crucial within the practice of victim participation since victims hardly ever speak for themselves, the developments in selecting legal representation for victims rather than accepting the victims' choice is yet another step in the direction of completely externalizing the voice of actually participating victims. Or, as a colleague of mine at Nairobi formulated, victims are being participated.³⁵⁰ This passive role that is attributed to the participants themselves becomes very clear when analysing the line of argumentation in relation to the selection of legal representation. The image of the passive victim perpetuated in the practice of selecting is accompanied by the respective paternalistic notion of the competent, active court providing the necessary assistance. Once again, for the sake of effectiveness, victims are grouped and represented and to still consider the requirement of meaningfulness, it is argued that this is better for the victims themselves. Thereby, all interests that may be conflicting with the legally defined interests are, from the very beginning, excluded. This is even furthered by taking over the selection process of LRV. In the following we will see that the respective reasoning can take rather absurd forms, when, against the expressive will of participants, it is still argued that measures taken are in the interest of *victims*. The Registry recommendations in Banda/Jerbo is especially illustrative in this aspect.

³⁵⁰ Interview NGO staff, 20/3/2014.

According to the Registry, “The new approach should promote the best quality of victim representation”³⁵¹. The practice of selecting legal representation for victims and developing criteria without consulting with the actual clients begs the question who promotes the best quality for whom - who is of relevance, the actual victim, or *the victims* constructed by the registry to subsequently decide what is in the best interest of this *victims*. The line of argumentation when deciding against the expressed will of represented victims, illustrates the paternalistic stance taken by the Registry and the concurring image of *the victims*.

In Banda and Jerbo, the Registry firstly doubts that the submissions by the legal representatives are based on the real informed choice, because for the victims to make such a choice, they would have needed assistance. Assistance by the Registry, who were for practical reasons not able to provide this assistance. The Registry knows “what is desirable in a legal representative”, victims participating do not necessarily know what criteria are important.³⁵² Similarly, in the Kenyan case, the Chamber, in order to overrule the expressive opposition of victims, refers to it as *alleged* opposition. Whereas when referring to the legally defined victims’ interests, they refer to them as *victims’ interests*.³⁵³ It is remarkable which criteria are now demanded of a genuine expression of victims’ views given that nearly each application for participation could be challenged if these criteria were applied. It is reflective of the practice of representation that these criteria are demanded when the view of participants may be conflicting with the interests of the court, and otherwise consultation is considered dispensable. This implies that the definition of the Chamber, the recommendations of the Registry and the submissions by the (right) legal representatives are neutrally representing the victims’ interests, whereas whenever there is opposition to these decisions, the views are not genuine and must have been partially influenced. In labelling these interests as alleged interest that are

³⁵¹ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203-Anx1, para. 11.

³⁵² Ibid., para. 8, fn. 8.

³⁵³ Pre-Trial Chamber II, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoe Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on „Motion from Victims a/0041710, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta CHANA for All Victims“, ICC-01/09-01/11-330, 9 September 2011, paras 5,16.

not genuine, or politically influenced, all non-fitting interests are excluded to maintain the image of the neutral, unpolitical Court.

Furthermore, it becomes particularly clear that the victims are perceived/constructed to be in need of assistance. In need of assistance by the court. They are not addressed as subjects with agency, rather the (right) agency has to be activated by the court. Without the help of the Registry they are unable to make a choice - when in fact, they made a choice, just not the right choice according to the Registry. This is remarkable, since it suggests that rather than letting the victims make bad choices on their own, the Registry makes choices for them. This implies that the Registry is in a position to know better what is in the interest of victims than the victims themselves. The Banda and Jerbo case shows that the victims themselves are not accepted to be political.³⁵⁴ Rather the court has to protect the victims from being politically instrumentalized, the participants themselves are not imagined as political subjects, but as merely wanting reparations and justice, like foreseen by the ICC.³⁵⁵ The truth, justice and reparations provided for by the court are unpolitical, whereas all other interests are always potentially political. The Court is a neutral and impartial institution wherefore organs of the Court are in the best position to assist the victims. This paternalistic stance continues when the Registry makes own recommendations³⁵⁶, allegedly based on the victims' interests, but in most cases without consultation of the participating victims. For example, the interest voiced by victims that they prefer a legal representative speaking their language is considered, but re-interpreted to mean that there has to be a field assistant with the same cultural background as sufficient. The weighting of different interests and the respective criteria is also finally done by the Registry, when deciding that the trust relationship is

³⁵⁴ Office of the Prosecutor, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Objection to the Continued Representation of Victims a/1646/10 and a/1647/10 by Messrs Geoffrey Nice and Rodney Dixon, 6 December 2010, ICC-02/05-03/09-110, paras. 2-3; Defence, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Application to restrain legal representatives for the victims a/1646/10 & a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries, 6 December 2010, ICC-02/05-03/09-113.

³⁵⁵ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Report on the organization of common legal representation, 5 August 2011, ICC-02/05-03/09-187, para. 5.

³⁵⁶ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Report on the organization of common legal representation, 5 August 2011, ICC-02/05-03/09-187.

less relevant than other criteria developed. In the best case, victims' views are considered. This best case is when they concur with the selection of the Registry. Otherwise, the Registry's assessment is pivotal. Thereby not only the victims' interests are streamlined and controlled, but also the ones through whom the views and concerns are transmitted to The Hague, because their quality and performance is assessed by the Registry. In conclusion, the Registry recommends to form one group with one representative per case to become the rule and weigh their own assessment of the quality of legal representation over the assessment made by victims.³⁵⁷

Yet again, this practice supports the legitimizing narratives perpetuated. The Court controls the selection of legal representation in the best interest of the victims. These interests are pre-defined in the practice of selection according to what the Court can deliver. Thereby, victim participation as it is practiced at the ICC generates *the victims* and the truth and justice they deliver accordingly. They are constructing the victim to exactly mirror the image the ICC draws of itself. The practice produces the perfect victim reproductive of the image of the benevolent efficient Western court. The opposition to this practice voiced in the submissions of the legal representatives, again re-emphasise the purpose of victim participation and re-iterates the rule as set in 90 RPE. They re-claim the authority to speak for the participating victims. Basically, it amounts to a struggle among legal representatives and the Registry over who legitimately may speak for *the victims*. This is the legal illustration of a struggle that was also reflected in my interviews. When arguing why they consider themselves to be good representatives as opposed to others, interviewees emphasised that they are able to organize and manage personal meetings with numerous clients, while at the same time being an expert in the legal proceedings at The Hague.³⁵⁸ Thereby, they ensure that victim participation is meaningful and effective. Interestingly, this terminology was only used by my interview partners at The Hague. In Nairobi different emphasis and different wording was used, and in general doubts as to the feasibility of victim participation as it is foreseen were prevailing.³⁵⁹ Influential NGOs lobbying for what they consider to be victims' interests are openly challenging

³⁵⁷ Registry, Situation in Darfur, Sudan in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Proposal for the common legal representation of victims, 25 August 2011, ICC-02/05-03/09-203-Anx2, para. 15.

³⁵⁸ See interviews LRVs, 20/6/2014; 26/6/2014.

³⁵⁹ See interviews with LRVs, 15/3/2014; 20/3/2014; Interview with NGO, 20/3/2014.

the practice of legal representation as it emerged over the time. They emphasize the initial role of the OPCV as a supporting unit for external counsel and the advantages of the external counsel system.³⁶⁰

Either way, the victims are represented and removed from the process itself. The legal representatives and NGOs, adhering to the legal logic, are complicit in constructing the image of a passive victim without agency who is always already in need of assistance in order to speak. It then is the Chambers that ultimately and with the legal authority invested in them, decide, who authoritatively spoke for the victims and thereby determine what is considered as *the victims'* interests.

2. Conclusion

“When it is managerialized and marketed, then what matters is not so much whether participation works, or is well done, but how it can help protect and advance institutional authority. Consequently, far from being taken up for people’s empowerment or democratic governance, PD [participatory development] is taken up, first and foremost, for institutional aggrandizement.” (Kapoor 2008, p. 246)

Similar to the ideal of participatory development as described by Kapoor in the quote, within the institutionalization process of the organization of application and representation at the ICC, if participation still works (meaningfully) faded into the background of effectively managing participation while still symbolizing the benevolent institution. However, meaningful and effective participation, each apart from the other, is always already lacking, and since the meaning attributed to each is binary, they are irreconcilable. Against this backdrop, the decisions by the Chambers defining meaningfulness and effectiveness, reaching for a just decision, can only fail. Because legal reasoning reaches for finality and closure, the fresh judgements taken within the practice of victim application and representation are inherently violent to irreducible complexity, heterogeneity and diversity. With regard to representational practices, these decisions always have a silencing effect. Within the application process and the practice of legal representation, the silencing manifest in practices of representation, collectivization and externalization.

³⁶⁰ Letter to the Registry on behalf of the VRWG, 17 August 2011, http://www.vrwg.org/VRWG_DOC/2011_08_17_VRWGLetter.PDF, last accessed 1/2/2018.

The effect of representation could be observed in two dimensions, the assumption that there is always already someone representing the participants and the image of *the victims* that is a representation of those victims who participate in the proceedings. First, the participants are represented by someone helping them to fill in the application forms, someone who is supposed to *speak about* the applicants. Then, the LRVs are selected for the participants and have to represent their clients' interests in a general way. This is possible because a legal representation of *victim's interests* is always already legally assumed. All other interests are not heard – they are described to be not genuine, or not relevant within the legal framework.

Collectivization took place through grouping victims already for the purpose of filling in application forms and subsequently as *the victims* suffering harm from the crimes tried at The Hague grouped to be represented by one legal representative. The grouping is organized according to the representation of victim's interests that fits the self-legitimizing image of the Court. Thereby, all diverging interests, all complexity, heterogeneity, individuality, the personal is externalized from the proceedings at The Hague. This is furthered by providing less and less space for information about possible interests of the participating victims in the application forms. Now, the traumatic violence is represented by *crime* – ticking the respective box in the form. And the effects of trauma on the participants is represented by *harm*. These representations also determine how the participants are grouped since the definition of distinct and conflicting interests is made accordingly.

The individual participants signs in the application form that s/he belongs to *the victims*. *The victims* are represented in one group and in most cases, they do not know who is representing them before the proceedings start. Only with the time, communication between representatives and their clients is established. Those working directly with the participants - those who have to reconcile complexity and simplicity, heterogeneity and homogeneity, individuality and collectivity, the meaningful and the effective- introduce the ghost of the symbolic function of *the victims* for the Court. The legal narrative of meaningful and effective while basically turning the norm, Rule 90 RPEs, upside down, deriving from the underlying preference for individual choice moving towards prescribed collective representation, is questioned. Meaning is related to hearing and without ensuring that the

participants are heard within the proceedings - victim participation is purely symbolic. This challenge of the legal framework is closed again by the Chamber. The Judges re-iterate the legal framework of speaking and hearing and decide that only what can be heard within this framework can be meaningful. The justice gap is closed and the ghost of the symbolic - the meaninglessness of criminal legal proceedings for the participants foreclosed.

Chapter 6: Subject I

1. Shaping “the victims”

As has been established in the previous chapter, “the victims” is a representation the individual victim has to accept in order to be participated at the ICC. In fact, it is often the legal representatives who speak and who are addressed as *the victims* in the written communications in the proceedings. Hence, “the victims” potentially signifies the group of participating victims, the victims in general or both. With the exception of the very rare cases when participating victims may present views and concerns in person, it is the legal representatives who speak on behalf of and about “the victims”.

The representation of “the victims” at the ICC took shape in the decisions of the different Chambers interpreting Rule 85 RPE and the central article within the victim participation framework: Art. 68 (3) RS. The development of the jurisprudence is once again reflective of a legal struggle, establishing who “the victims” are and negotiating a space for “the victims” in the proceedings. Rule 85 RPE and Art. 68 (3) RS determine who “the victims” are, what they can say, at which stages, in which manner and to whom. The institutionalization of the representation of “the victims” as a subject speaking at the Hague is the topic of this chapter. While in the last chapter, the application phase and the selection and organization of representation was addressed, now the definition of the victim (2.), the requirements to participate (3.) and the modalities of participation (4.) within the proceedings, beside the parties, are analysed.

Rule 85 RPE entails a definition of victims that is the starting point for the institutionalization of “the victims” within the proceedings at the ICC which in turn is reflective of the silencing effect already described with regard to the application and representation phase. Reading Rule 85 RPE together with the victim’ interest requirement of Art. 68 (3) RS, those victims who are granted participatory rights in the proceedings before the respective Chambers are defined. And lastly, based on the definition of interests, a set of procedural rights is accorded to the LRVs.

2. “The victim”

Rule 85 Definition of victims

“For the purposes of the Statute and the Rules of Procedure and Evidence: (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;”

According to the text of rule 85, the definition of victims is rather broad, potentially all persons who suffered harm as a result of the commission of any crime listed in Article 5, 11 et seqq. RS would be implied and therefore eligible for participation. Against this backdrop, the first criteria to be fulfilled by a victim applicant is that:

- i) his or her identity as a natural person must be established; and
- ii) he or she has suffered (personal) harm;

For the purpose of determining who is *the victims* participating in different stages of the proceedings, Rule 85 RPE is complemented by the personal interest element of Art. 68 (3) RS, adding a third criteria to the list:

“iii) the harm suffered is as a result of an incident falling within the parameters of the confirmed charges”³⁶¹ in the Pre-Trial Phase and Trial Phase³⁶².

A similar approach is applied when deciding upon participation in judicial proceedings during Investigation Phase. The applicants must demonstrate whether the personal interests are affected by the issue that is subject-matter of the judicial determination.³⁶³

³⁶¹ Pre-Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, ICC-01/04-02/06, para. 18.

³⁶² Trial Chamber VIII, Prosecutor v. Ahmad Al Faqi Al Mahdi, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims, 8 June 2016, ICC-01/12-01/15-97-Red, para. 17.

³⁶³ Trial Chamber II, Situation in the Republic of Kenya, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2010, ICC-01/09-24, para 16.

In the more recent decisions in Mahdi and Ntaganda, these criteria are presented as established jurisprudence.³⁶⁴ The interpretation of the respective rules and the corresponding argumentation leading to the fixation of this third criteria is indicative of the institutionalization of victim participation at the ICC. Therefore, although undisputed jurisprudence, it will be described in more detail.

2.1. His or her identity as a natural person must be established

With regard to the identity as a natural person, there is no legal dispute. The practical problematic of obtaining substantial identification documents in areas of conflict, was solved by applying a low evidentiary threshold according to Art. 55 II RS.³⁶⁵ Hence, the requirement of proving one's identity is low and the Chambers accept a wide range of documents.³⁶⁶

2.2. He or she has suffered personal harm

Harm is not defined in the Statute or RPE, but was defined by the Chamber in the Congo Situation to confine economic loss, physical suffering and emotional suffering.³⁶⁷ These types of harm and the decision that having suffered one of them suffices is established jurisprudence of the Court.³⁶⁸ Furthermore, the injury, loss, or damage must be personal. This requirement was introduced by the Appeals

³⁶⁴ Pre-Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, ICC-01/04-02/06, para. 18.

³⁶⁵ Pre-Trial Chamber I, Situation in the Democratic Republic of Congo, Public Redacted Version Decision on the Applications for Participation in the Proceedings by VPRS 1, VPRS 2, VPRS 3 and VPRS 4, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 99.

³⁶⁶ See, among others, Trial Chamber I, Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Laurent Gbagbo, Decision on victim participation, 6 March 2015, ICC-02/11-01/11-800, para. 31 and footnotes contained therein. This may include: passport; birth certificate; national identity card; driving license; electoral card; marriage certificate; consular identity card; death certificate; document pertaining to medical treatment, rehabilitation or education; church membership card; family registration booklet; employee identity card; political party membership card; pension booklet; or a signed declaration from two witnesses accompanied by their proof of identity, attesting the identity of the applicant. This decision was adopted in the last ruling thereon: Trial Chamber VIII, Prosecutor v. Ahmad Al Faqi Al Mahdi, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims, 8 June 2016, ICC-01/12-01/15-97-Red, paras 18-19.

³⁶⁷ Pre-Trial Chamber I, Situation in the Democratic Republic of Congo, Public Redacted Version Decision on the Applications for Participation in the Proceedings by VPRS 1, VPRS 2, VPRS 3 and VPRS 4, 17 January 2006, ICC-01/04-101-tEN-Corr, paras 81-82.

³⁶⁸ Pre-Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, ICC-01/04-02/06, para 28.

Chamber, denying the inclusion of indirect victims within the realm of Rule 85 RPE when they lack a personal relation with the direct victim.³⁶⁹

“Indirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged.”

“Excluded from the category of ‘indirect victims’, however, are those who suffered harm as a result of the (later) conduct of direct victims. The purpose of trial proceedings at the ICC, as stated by the Appeals Chamber, «[i]s the determination of the guilt or innocence of the accused person of the crimes charged» and it is only victims of the crimes charged who may participate in the trial proceedings pursuant to Article 68(3), when read together with Rules 85 and 89(1). [...] Although a factual overlap may exist between the use of the child actively to participate in hostilities and an attack by the child on another, the person attacked by a child soldier is not an indirect victim for these purposes because his or her loss is not linked to the harm inflicted on the child when the offence was committed.”³⁷⁰

The requirement of a personal harm is accepted jurisprudence and an inherent component of the notion of “the victims”.

“In this respect, the Single Judge recalls the findings of other Chambers of the Court, including the Appeals Chamber, to the effect that “the notion of victim necessarily implies the existence of personal harm”.³⁷¹

Accordingly, the strict definition of harm is loss, injury and damage, material, physical and psychological harm while in a second step, relating Rule 85 RPE to Art. 68 (3) RS, this harm is required to be the result of – causally linked to- the crimes under consideration. This could be the crimes allegedly committed in the situation country, the crimes in the Document Containing the Charges (DCC), or the crimes the accused is charged with on Trial in the respective phases of the proceedings. This link is established through the requirement of the harm to be personal to exclude

³⁶⁹ Pre-Trial Chamber I, Situation in the Democratic Republic of Congo, Corrigendum to the “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06, 31 January 2008, ICC-01/04-423-Corr-tENG, para 4.

³⁷⁰ Ibid., para 4.

³⁷¹ Pre-Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, ICC-01/04-02/06, para. 30.

certain indirect harms caused by crimes that are not directly subject of the respective legal proceedings. The link requirement is furthermore read into the words “*as a result of*” a crime under the jurisdiction of the court. The reasoning is derived from the interpretation of Art. 68 (3) RS. This interpretation was undertaken in relation to determining if participating victims have an interest in participating in different stages of the proceedings in general and in a next step to determine the modalities of participation that are appropriate and not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

3. Victims’ interests

The first decision extensively dealing with the interpretation of 68 (3) of the Rome Statute and the nature of the personal interest of “the victims” was Pre-Trial Chamber I’s decision on participation in the investigation phase. It held that *the victims* have a right to effective participation which consequently entails an obligation of the Chambers to permit victims to present their views and concerns and a corresponding obligation to examine them which is defined to be the effective and concrete manner of participation. In this first decision the Chamber held that victim participation should be concrete and effective – as has been shown, the term concrete was replaced by meaningful in the course of the time. Moreover, the Chamber indicated that participation requires the presentation of views and concerns as well as their examination by the Chamber – the voice to be heard and considered.

“S’agissant de l’article 68-3, la Chambre estime qu’il impose une obligation à la Cour vis-à-vis des victimes. L’utilisation du présent de l’indicatif dans la version française du texte (« la Cour permet ») ne laisse aucun doute sur le fait qu’au droit d’accès des victimes à la Cour correspond une obligation positive à la charge de celle-ci de leur permettre d’exercer ce droit de manière concrète et effective. Par conséquent, il échoit à la Chambre la double obligation, d’une part, de permettre aux victimes d’exposer leurs vues et préoccupations, et d’autre part, de les examiner.”³⁷²

According to the same decision, this right to present views and concerns is derived from the affected personal interests:

³⁷² Situation en République Démocratique du Congo, Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, La Chambre Préliminaire I, 17 Janvier 2006, ICC-01/04-101, para. 71.

“Le droit de présenter leurs vues et préoccupations et de déposer des pièces en relation avec l’enquête en cours est le résultat du fait que les intérêts personnels des victimes sont concernés...”³⁷³

Similarly, the Pre Trial Chamber in the Uganda situation stated that “pursuant to Art. 68, paragraph 3, of the Statute the paramount criterion for participation to be allowed is that the “personal interest” of the applicant victims have to be affected.”³⁷⁴

The personal interest requirement is established as the central criterion defining “the victims”, linking their harm to the criminal proceedings.

“That the personal interest of a victim are affected in respect of proceedings relating to the very crime in which that victim was allegedly involved seems entirely in line with the nature of the Court as a judicial institution with a mission to end impunity for the most serious crimes.”³⁷⁵

“...the constituent elements of the definition of victim under rule 85 of the Rules are present, the fact that such a victim's personal interests are "affected" by criminal proceedings relating to the event or events in question seems incontrovertible. Indeed, commentators regard the fact "that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct" as a self-evident assumption;...”³⁷⁶

The line of argumentation is that individual victims suffered harm as a result of a crime under the jurisdiction of the court and therefore they naturally have an interest in the criminal proceedings related to the crime. “The victims” at The Hague, accordingly, are defined by their harm which is linked to the crime which in turn constitutes their personal interest in the proceedings at the ICC. Henceforth, this is linked to the mission and nature of the court itself – ending impunity.

This general interest in criminal proceedings is specified interpreting the interests of victims in line with international human rights law, namely the right to truth, justice and reparation. Thus, the link is drawn from criminal proceedings, to truth and justice to the personal interests of victims (their needs caused by the victimization).

³⁷³ Situation en République Démocratique du Congo, Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, La Chambre Préliminaire I, 17 Janvier 2006, ICC-01/04-101, para. 72.

³⁷⁴ Pre Trial Chamber I, Situation in Uganda, Decision on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, para. 9.

³⁷⁵ Ibid., para. 10.

³⁷⁶ Ibid., para. 9.

3.1. Specifying general (natural) interests: truth and justice

When terminologically, contextually and teleologically interpreting the norms on victim participation in the Rome Statute, Pre Trial Chamber I in the DRC situation referred to the rights to truth and justice as to derive “the victims” personal interests in the proceedings. Relating to international developments in human rights law, specifically to the Declaration and the Guidelines discussed in Chapter 2, the Chamber observes that as a part of it, articles 68 (3) of the RS, 91 and 92 of the RPE as the main features of the victim participation framework at the ICC can be located within the broader international framework of victims’ rights and constitute a novelty in international criminal law. To that effect, Pre-Trial Chamber I held that victims interests are in a general way affected by the clarification of the facts, the punishment of the responsible and finally by possible reparations.³⁷⁷

Accordingly, Pre-Trial Chamber I expressly draws back to the Declaration when interpreting article 68 and states that the objective and purpose are not different from those considerations that are at the roots of the role granted to victims in domestic criminal systems, namely, the recognition that the issue of guilt and innocence of those investigated and prosecuted affects victims’ core interests and such interests are better acknowledged when providing victims with a meaningful and independent role within the criminal legal proceedings.³⁷⁸ With regard to the clarification of facts, it is elaborated further that the right to truth implies the declaration of truth by a competent body and clarification connotes that facts are determined closing the possible gap between factual findings resulting from the criminal proceeding and the actual truth.³⁷⁹ Inherently linked to this is the core interest of victims in the guilt or innocence of the accused. Referring to an empirical study on war victimization and victims’ attitudes towards addressing atrocities, it is maintained that interests go beyond the determination of what happened and include the prosecution, conviction and punishment of victimizers.³⁸⁰ All these aspects are at

³⁷⁷ Situation en République Démocratique du Congo, Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, La Chambre Préliminaire I, 17 Janvier 2006, ICC-01/04-101, para 53.

³⁷⁸ Pre Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, para. 160.

³⁷⁹ Ibid., para. 32.

³⁸⁰ Ibid., para 35, Kiza et al. (2006).

the root of the right to justice acknowledged separately from the right to truth, although closely linked and containing interrelated elements. Thus, it is confirmed that the victims' personal interest is affected by the outcome of the Pre-Trial Stage.³⁸¹ Taking this into consideration, participants should be given a meaningful role allowing them to substantially impact the proceedings. Interestingly, in these early decisions, meaningful was still linked to having an impact – speaking was required to have consequences which is only possible if it is heard.

The decisions initially interpreting Art. 68 (3) RS all contain elaborations pertaining to the right to truth and justice, underlying the victim participation framework, which is celebrated as a novelty in international criminal law. Defining personal interests, the decisions rely on international principles to avert that the very purpose of victim participation is the victims' legitimate interest in truth and justice, which has to be provided to them through granting participatory rights in the proceedings. It is the criminal proceedings conducted at the ICC that produces truth by clarifying the facts and thereby closing the gap and as a consequence provides justice – therefore, naturally, victims have an interest. This interest in turn is constitutive of the very definition of “the victims”. The legitimizing narrative of the ICC vis à vis victims is read into the definition of victims itself, thereby, it is impossible to find a victim irritating this legitimizing basis, since this would, by definition, not be a victim. With this operation, the *nature* of the victim is fixed and linked to the *nature* of the court and the inherent legitimizing link is presented as self-evident – as natural. Consequently, it is always already in the nature of the court to serve victims' interests regardless of the variety of different interests victims might have. Thereby, hearing is framed in such a way that what is being heard by the court is always already a confirmation of its own self-legitimization. The lack and excess of representation and the (im)possibility of truth and justice and the related justice gap is barred. This preclusion by definition is furthered when specifying the alleged interests in truth and justice by the requirement to link the harm suffered by the applicant to the crime charged. The truth of the victims is thereby represented by their harm and the justice delivered by the court is related to the crime under

³⁸¹ Pre-Trial Chamber I, Situation in Darfur, Sudan, Prosecutor v. Bahar Idriss Abu Garda, Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, 6 October 2009, ICC-02/05-02/09-136, para 5.

consideration. In so doing, it is ensured that not only does the ICC, in general, always already serve victims' interests in truth and justice, but that each Chamber anew serves the interests of the participating victims.

3.2. Harm and crime – the link – as a result of rule 85

Initially, Trial Chamber I in Lubanga found that “neither rule 85 of the Rules of Procedure and Evidence nor the Rome Statute framework has the effect of restricting the participation of victims to the crimes contained in the charges confirmed by the Pre-Trial Chamber.”³⁸² This decision was appealed both by the Prosecution and by the Defence and it was clarified by the Appeals Chamber that “[F]or the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68 (3) of the Statute must be linked with the charges confirmed against the accused.”³⁸³

In the appealed Trial Chamber decision, the judges held that

“[A] victim of any crime falling within the jurisdiction of the court can potentially participate. However, self-evidently, it would not be meaningful or in the interests of justice for all such victims to be permitted to participate as victims in the case against Mr Thomas Lubanga Dyilo, given that the evidence and the issues falling for examination in the case (which will be dependent on the charges he faces) will frequently be wholly unrelated to the crimes that caused harm to victims coming from this very wide category.”³⁸⁴

Against the backdrop of this assertion, the Trial Chamber constructed a filter similar, but different from the now established general link between the harm suffered and the crimes under consideration:

“(i) Is there a real evidential link between the victim and the evidence which the Court will be considering during Mr Thomas Lubanga Dyilo's trial [...], leading to the conclusion that the victim's personal interests are affected? Or

(ii) Is the victim affected by an issue arising during Mr Thomas Lubanga Dyilo's trial because his or her personal interests are in a real sense engaged by it?”³⁸⁵

The Appeals Chamber generalized this filter to imply a link between the harm and the crime under consideration since this would be in accordance with the personal

³⁸² Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, p. 3, summarizing the issues in appeal.

³⁸³ *Ibid.*, para 2.

³⁸⁴ *Ibid.*, para 41.

³⁸⁵ *Ibid.*, para 41.

interest requirement of Art. 68 (3) RS and the object and purpose of Rule 85 RPE. Consequently, the decision if the harm is linked to the crime is constitutive of the definition of “the victims” in the case. In a first step, it is argued that the effect of Art 68 (3) RS is that victims must be linked to the charges, because only those victims would have a personal interest in the respective proceedings. This would be inherent in the definition of the victim:

“The Appeals Chamber acknowledges that rule 85 does not have the effect of restricting the participation of victims to the crimes charged. However, the provision must be read in context and in accordance with its object and purpose.”³⁸⁶

...the object and purpose of rule 85 is to define who are victims. Thus, whilst the ordinary meaning of rule 85 does not per se, limit the notion of victims to the victims of the crimes charged, the effect of article 68 (3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in rule 89 (1) of the Rules, is limited to those victims who are linked to the charges.³⁸⁷

“Given that the purpose of trial proceedings is the determination of the guilt or innocence of the accused person of the crimes charged, and that the application under rule 89 (1) of the Rules in this context is for participation in the trial, only victims of these crimes will be able to demonstrate that the trial, as such, affects their personal interests. Therefore, only victims who are victims of the crimes charged may participate in the trial proceedings pursuant to article 68 (3) of the Statute read with rule 85 and 89(1) of the Rules. Once the charges in a case against an accused have been confirmed in accordance with article 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged.”³⁸⁸

Once again, the personal interest in criminal proceedings is inherently linked to the very definition of “the victims”. In a next step, this link is specified by the harm suffered (the victim) and the crimes charges.

“It is for the Trial Chamber to determine within this framework whether an applicant is a victim, because he or she suffered harm in connection with the particular crimes charged, and if so, whether the personal interests of the applicant are affected. If the applicant is unable to demonstrate a link between the harm suffered and the particular crimes charged, then even if his or her personal interests are affected by an issue in the trial, it would not be

³⁸⁶ Appeals Chamber , Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 54.

³⁸⁷ Ibid., para 58.

³⁸⁸ Ibid., para 62.

appropriate under article 68 (3) read with rule 85 and 89 (1) of the Rules for his or her views and concerns to be presented.”³⁸⁹

Step by step it is established, that naturally victims have an interest in the establishment of guilt or innocence – in criminal proceedings – and that this interest is a precondition for being a victim within the participatory framework. What defines a victim is the personal harm suffered, hence, this harm has to be linked to the crimes under consideration. And finally, although the personal interest in the criminal proceedings dealing with the very crimes the victims claim to have suffered from was established to be inherent in the definition of the victims, in case there should be different personal interests they would not be appropriate within the proceedings at the Court. Thus, in a last step, it is acknowledged that there might be diverging interests – but they are excluded as inappropriate within the proceedings. The last sentence can be read as an assurance against the lack and excess of the definition/representation of “the victims”. Since the victims were defined by their alleged interests in the proceedings and thereby all those individuals who might have different interests are already precluded by the very definition of “the victims”, to which the individual victims have confirmed to belong by their signature in the application forms, it was already precluded in the definition/representation of *the victims* that there might be different interests. Nevertheless, the Chamber felt the necessity to reiterate the inappropriateness of such interests within the proceedings. This can be read as a sign for the always already lacking representation of *the victims* which was sensed by the Chamber and re-assured by defining and excluding all possible other interests as inappropriate. Two different operations are at work here. Applying the first filters is in fact already a decision about what is and what is not appropriate in the proceedings – a fresh judgement on appropriateness – the very character of which was instantly obscured by the naturalization of “the victims” and “their interests”. The decision did not state that the appropriate victims are those who have appropriate interests matching the appropriate mission of the court, since this would reveal the inherent exclusionary violence of the decision. Instead, the Chambers held that the victims, because of the link between their harm and the crime under consideration – their interest in truth and justice – naturally have an

³⁸⁹ Appeals Chamber, Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para 64.

interest in the proceedings pertaining to the crimes of the accused. The second re-assuring operation then was to exclude all inappropriate interests. This reveals the always already lacking definition/representation of “the victims” which in turn reveals their operation as fresh judgement bearing the traces of the undecided.

From then on, Chambers without exception apply the criterion of a special link between the harm and the crime when deciding who is eligible to participate. For an according determination, the information contained in the application forms is used. Since, in the recent forms this information is confined to exactly these legally relevant information, the decision appears to have become a matching operation. Do the boxes ticked by the victim concerning the harm suffered, and the information concerning the time and the location of the alleged crimes link to the crimes contained in the DCC, or in the crimes confirmed by the Pre-Trial Chamber and admitted to Trial?

Indicative of the exclusions produced by the definitional practice is once again the Banda case. Here the prosecution charged the accused with crimes committed during an attack against an AU-Peacekeeping compound, the MGS (military groups site) Haskanita. Residents of the nearby village, Haskanita, that was also attacked, submitted that they had suffered harm as a result of the attack and therefore qualify as victims in the case. Some claimed that they had suffered harm due to abandonment of the MGS Haskanita by the African Union (AU), as a consequence they lost their jobs and had to leave their homes.³⁹⁰ The Chamber held that even if this harm could be linked to the attack on the MGS Haskanita, it would be too remote from the alleged crimes to be still considered as a result of those crimes within the meaning of rule 85 (a) of the RPE.³⁹¹ Another group of applicants alleged that they were residents of Haskanita village which was looted and houses were burned shortly after the attack on the MGS and that they suffered psychological and material harm as a result of the attack on the village since they had to flee.³⁹² The Chamber was not satisfied that the harm claimed by the applicants was caused by the attack on the compound itself, since the applicants submitted that they left the area

³⁹⁰ Pre-Trial Chamber I, Situation in Darfur, Sudan, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on Victims’ Participation at the Hearing on the Confirmation of Charges, 29 October 2010, ICC-02/05-03/09-89, para. 13.

³⁹¹ Ibid., para. 15.

³⁹² Ibid., paras 19-20.

of Haskanita in response to the attack allegedly perpetrated by the rebels on the village of Haskanita and not as a result of the attack on the MGS.³⁹³ As a consequence the applicants were not considered victims of the case. Yet other applicants submitted that they worked on the compound on the day of the attack and that they suffered psychological and physical harm as a result. They further explained that due to the termination of the AU presence in Haskanita they lost their jobs and had to leave their homes and possessions and therefore also suffered economic harm.³⁹⁴ The Chamber differentiated, it held,

“that only the alleged psychological harm suffered by the applicants qualifies as harm resulting from the charges against the suspect, since both applicants were traumatised as a result of the attack, during which their own lives were threatened and they witnessed AU soldiers being killed and injured.”³⁹⁵

With regard to an applicant who worked at the compound until shortly before the attack, and when returning to the village heard the shooting and was afraid of an attack on the village (which subsequently took place and his house was burned), the Chamber decided that “[S]ince the applicant did not see the attack, but only heard gunfire from the direction of the camp, the Chamber is of the view that the applicant’s experience is too remote to satisfactorily establish that he suffered psychological harm as a result of it.”³⁹⁶

Dealing with the differentiation of the three relevant types of harm, the Chamber drew clear lines, demarcating relevant harm from irrelevant harm. This also implied a determination of trauma as psychological harm. The harm must be caused by direct physical violence, or by directly witnessing – seeing – the violence. The complex situation implying a pattern of violence that was exercised against human beings and their belongings in Haskanita and the interrelated anxiety related to the exposure to this violence and its consequences on the lives of the applicants were divided into manageable units which were hierarchically structured. Thereby, the messiness of the situations under consideration is sanitized and trauma is reduced to harm causally linked to the crimes – speakable at the court.

³⁹³ Pre-Trial Chamber I, Situation in Darfur, Sudan, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on Victims’ Participation at the Hearing on the Confirmation of Charges, 29 October 2010, ICC-02/05-03/09-89, para. 21.

³⁹⁴ Ibid., paras 27-28.

³⁹⁵ Ibid., para. 29.

³⁹⁶ Ibid., para. 34.

3.3. Externalization

The practice of institutionalization of the victim definition therefore implies two externalizing filters. The first filter is the combined reading of Rule 85 RPE with Art. 68 (3) RS making the link between the personal harm and the respective crimes under consideration a requirement to participate. This link is derived from the *personal interest* element entailed in Art. 68 (3) RS.

Through these filters, as has already been indicated in the previous chapter, “the victims” abstract interests in truth and justice, elaborated in the theoretical framework, are transformed into the notions of harm and crime. In this chapter the link of the harm to the crime negotiated is drawn, ensuring that the harm is manageable at the ICC. The representation of “the victims” therefore is shaped by their alleged interests and this determines what they might say. The space for articulation is framed by determining harm and this has to be linked to the determination of crimes, the latter frame what can be heard (legally processed/translated into legal decisions and judgements). Consequently, after transforming truth and justice into harm and crime, all the allegedly non-legal aspects of truth and justice are externalized and the image of the ICC delivering truth and justice is re-produced. Simultaneously, trauma is represented by the legal category of psychological harm, which is caused by directly witnessing, or being subjected to physical violence. It is distinguished from physical and economic harm. The different types of harm are strictly separated and the Chambers apply the logic of causality to determine which harm is precluded. Harm that is indirect must be personal – that is, the crime is the starting point and if the harm of the applicant is too remotely linked to the harm directly caused by the crime – s/he is no victim in the case. Thereby, the messiness, complexity and intangibility of violence and trauma is sanitized. Trauma is manageable as psychological harm that can be addressed by the Court. By shaping the representation of “the victims” accordingly, the traumatic Real is precluded.

4. Finding a space within the proceedings

After having defined the victim as described, the Chambers still have to decide on the set of procedural rights of the participating victims, or to be precise, their representatives. The interpretation of *personal interests* in combination with *views and*

concerns pursuant to Art. 68 (3) RS is decisive in this context. The personal interest in truth and justice as the telos of participation, which was then translated into harm and crime defining “the victims” is now appropriated in yet another step, depending on the different stages of the proceedings.

4.1. Investigation Stage

As mentioned above, one of the first decisions, exclusively dealing with the interpretation of article 68 (3) RS addressed the question of whether victims are entitled under the Rome Statute to participate in the Investigation Phase of a situation prior to a case being opened or outside the scope of an opened case.³⁹⁷ Initially, basing the reasoning on the victims’ interest in truth and justice and the respective international principles, Pre-Trial Chamber I confirmed this participatory right pursuant to Art. 68 (3) RS. To that effect, Pre-Trial Chamber I states that victims interests are in a general way affected by the clarification of the facts, the punishment of the responsible and finally by possible reparations.³⁹⁸ Referring to the judgements of the ECtHR the Pre-Trial Chamber declares that victims should play an independent role, especially vis à vis the Prosecution.³⁹⁹ It was considered to be sufficient to determine victims’ interests in relation to the stage of the proceedings as opposed to an analysis in relation to specific procedural activities.⁴⁰⁰ The Appeals Chamber revised this general interpretation to the extent that it differentiated between the Prosecution’s investigative activity and judicial proceedings during the Investigation Phase, allowing victims to participate only in the latter. By so doing,

³⁹⁷ La Chambre Préliminaire I, Situation en République Démocratique du Congo, Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, La Chambre Préliminaire I, 17 janvier 2006, ICC-01/04-101.

³⁹⁸ Ibid., para 53.

³⁹⁹ Ibid., para 51.

⁴⁰⁰ Similarly, Pre-Trial Chamber I, Situation in Darfur Sudan, Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, 6 December 2007, ICC-02/05-111, para. 13; Pre-Trial Chamber II, Situation in Uganda, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101 referring to the Congo decision; this was revised with regard to the Appeals Chamber ruling in: Pre-Trial Chamber II, Situation in Uganda, Decision on victims' applications for participation a/0192/07 to a/0194/07, a/0196/07, a/0200/07, a/0204/07, a/0206/07, a/0209/07, a/0212/07, a/0216/07, a/0217/07, a/0219/07 to a/0221/07, a/02228/07 to a/0230/07, a/0234/07, a/0235/07, a/0237/07, a/0324/07 and a/0326/07 under rule 89, 10 March 2009, ICC-02/04-180.

victims' participation was confined to judicial proceedings provided that the personal interest is affected by the issue arising for resolution.⁴⁰¹

This is a very much criticised decision, since it is at this stage where the Accused and the specific charges are determined and decided upon. The charges in turn define who is victim in the case – who can demonstrate a link between the harm and the crime. Especially in the first case against Lubanga the narrow charges were criticized for excluding sexualized violence and hence all respective victims from the proceedings (SáCouto 2011, pp. 338–339; Spiga 2010, pp. 197–198; Pena 2010, pp. 507–508). In conclusion, beside the rights enshrined in art. 15 (3) and 19 (3) RS, victims have no saying in the process of defining the scope of the cases.

As concerns the judicial proceedings, the Court authorized victims to address the Chamber requesting to present their views and concerns, to file documents pertaining to the relevant situation, to request the Pre-Trial Chamber to order special proceedings and to have notification rights. The Court limited the participatory rights of the victims by not giving them access to any non-public document contained in the record of the situation. Unless otherwise decided upon request, victims' representatives were not allowed to attend confidential proceedings.

4.2. Pre-Trial

Pre-Trial Chamber I, deciding on the set of procedural rights at Pre-Trial Stage, finds that the recognition of the issue of guilt and innocence of those investigated and prosecuted affects victims' core interests and such interests are better acknowledged when providing victims with a meaningful and independent role

⁴⁰¹ Appeals Chamber, Situation in the Democratic Republic of Congo, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, para 45; Pre-Trial Chamber II, Situation in Uganda, Decision on Victim's Participation in Proceedings Related to the Situation in Uganda, 9 March 2012, ICC-02/04-191, para 10.

within the criminal legal proceedings.⁴⁰² Thus it is confirmed that the victims' personal interest is affected by the outcome of the Pre-Trial Stage.⁴⁰³

When such general interests are confirmed, in a second step, it is at the Chamber's discretion to develop a set of procedural rights determining what presenting views and concerns would entail.⁴⁰⁴ While this determination of general victims' interests was conducted in the earlier decisions, later, Pre-Trial Chambers confined themselves to defining the set of procedural rights.⁴⁰⁵

In case the victims claim further participatory inventions they again have to show a specific personal interest. In Pre-Trial Phase, the victims' representatives accordingly have an established right to make opening and closing statements (Rule 89 I RPE), to be present in public hearings (Rule 91 II RPE) and to have access to the public record of the case, this implies all public filings and the transcripts of public sessions and the public evidence (Rules 131 II, 89, 91 RPE). With regard to *ex parte* hearings, the Chamber retains the option to decide on a case by case basis upon request by the legal representatives. Whether the legal representatives are granted access to confidential filings also depends on the respective decision of the Chambers on a case by case basis. In such a request the legal representatives have to

⁴⁰² Pre Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, para. 160.

⁴⁰³ Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, 6 October 2009, ICC-02/05-02/09-136, para 5.

⁴⁰⁴ This two step approach was followed by other Pre-Trial Chambers: Pre-Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba-Gombo, Decision on Victim Participation, 12 September 2008, ICC-01/05-01/08-103-tENG-Corr; Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, 6 October 2009, ICC-02/05-02/09-136; Pre Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474.

⁴⁰⁵ Pre-Trial Chamber I, Situation in the Rpublic of Côte d' Ivoire in the case of the Prosecutor v. Charles Blé Goudé, Decision on victims' participation in the pre-trial proceedings and related issues, 11 June 2014, ICC-02/11-02/11-83; Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. Uhuru Muigai Kenyatta et. al, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, , 26 August 2011, ICC-01/09-02/11-267 ; Pre-Trial Chamber I, Situation in the Rpublic of Côte d' Ivoire in the case of the Prosecutor v. Laurent Gbagbo, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138.

demonstrate a personal interest of the victims in the filing, or evidence by demonstrating a link between the harm suffered and the content of the confidential material.⁴⁰⁶ Legal representatives are furthermore entitled to file written motions, responses and replies in relation to all matters for which the Statute or the Rules does not exclude their intervention (91 II RPE).⁴⁰⁷ Pre-Trial Chamber II ruled that the right to file written submissions also preconditions an application to that effect, demonstrating that the issue under consideration affects the victims' personal interests.⁴⁰⁸ If legal representatives wish to question witnesses, they must make an application to the Chamber.⁴⁰⁹

In more recent cases, the set of procedural rights was modified to the benefit of the participating legal representatives and their clients. Now the access to confidential filings and the attendance of non-public hearings is granted in general and an exception to this rule can only be ordered if specific reasons warrant such measure.⁴¹⁰ Furthermore, they are generally allowed to make written submissions and

⁴⁰⁶ Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, 6 October 2009, ICC-02/05-02/09-136, paras. 11-20; Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on Victims' Participation at the Hearing on the Confirmation of Charges, 29 October 2010, ICC-02/05-03/09-89, paras 58-68; Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on Victim's Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11, paras. 86-97.

⁴⁰⁷ Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, 6 October 2009, ICC-02/05-02/09-136, para 25; Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on Victims' Participation at the Hearing on the Confirmation of Charges, 29 October 2010, ICC-02/05-03/09-89, paras 58-68; Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on Victim's Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11, para 101.

⁴⁰⁸ Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on Victim's Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11, para 101.

⁴⁰⁹ Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, 6 October 2009, ICC-02/05-02/09-136, para 24; re-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on Victims' Participation at the Hearing on the Confirmation of Charges, 29 October 2010, ICC-02/05-03/09-89, paras 58-68; Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on Victim's Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11, para 100.

⁴¹⁰ Pre-Trial Chamber II, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Decision on contested victims' applications for participation, legal representation and their procedural rights, 27 November 2015, ICC-02/04-01/15, paras. 29, 31.

have a right to respond in writing.⁴¹¹ These amendments expedite the proceedings and are an expression of the normalization of the presence of legal representatives of “the victims” in the proceedings. Against the backdrop of the experiences with legal representatives in the courtroom and as a “third participant”, the previous reservations of the Prosecution and the Defence and also of the Judges seemed to have declined. This is also an outcome of the institutionalization of victim participation.

4.3. Trial Phase

Generally, during Trial Phase, victims and their legal representatives have a broader set of procedural rights. In addition to those at Pre-Trial Stage, at Trial victims, meaning their representatives, have the right to lead and challenge evidence, and/or present their views and concerns in person. Also, the right to question witnesses is elaborated in more detail here, since all modes of participation were discussed and are representative of the search for a space within the proceedings vis à vis the parties. Hence, the interests of the victims are defined by distinguishing them from the parties’ interests. The genuine victims’ interests are mainly demarcated from the interest of the Prosecution – searching for a space within the proceedings and balancing the rights of victims with the right to a fair trial of the accused. This is illustrative of yet another impossibility of the subject position of “the victims” within the proceedings - on the one hand the victim is said to be in need of truth and justice and healing through participation and therefore has a right to an own standing within the proceedings, on the other hand interests are, so far, interpreted in line with what the court can deliver - finding and judging the facts of the crime which is equated with the harm suffered of “the victims”. As demonstrated above, harm and crime are the equivalents of truth and justice and “the victims” are defined to be in need of this kind of truth and justice - their very definition is linked to these interests. Now, finding the facts and seeking a judgement are exactly the tasks of the Prosecution and the Chamber, which renders it difficult to claim a position beside these two organs, without adding additional prosecutors which is frequently criticised by the Defence.

⁴¹¹ Pre-Trial Chamber II, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Decision on contested victims’ applications for participation, legal representation and their procedural rights, 27 November 2015, ICC-02/04-01/15, paras 33, 35.

Yet, this is exactly what is being asked of “the victims”, who, in order to claim a right to question witnesses, lead evidence and present views and concerns in person, have to demonstrate that they have an interest beside the original interest already represented by the Prosecution and the Chambers. The respective legal struggles are illustrating the further assimilate “the victims”.

4.3.1. Leading and challenging evidence

The decision of the Lubanga Trial Chamber to allow victims - their representatives - to lead and challenge evidence and the subsequent confirmation by the Appeals Chamber, at the time, surprised many commentators (Vasiliev 2015, p. 1169; Friman 2009, p. 492). In the doctrine the legal construction authorizing the legal representatives of victims to submit evidence referring to Art. 69 (3) RS and the Chambers power to request the submission of evidence that it considers necessary for the determination of the truth, is rather controversial (Vasiliev 2015, p. 1169). Although by now the right to lead and challenge evidence is established jurisprudence, the initial decision of the Appeals Chamber was discussed very controversially. The decisions on the requirement to demonstrate a personal interest in the judicial proceedings so far were more restrictive and would not have suggested the change of direction taken, when granting such a right to victims. The two dissenting opinions show the controversy, especially about the position of participants and their legal representatives beside the position of the Prosecution. Given the clear wording of Art. 69 (3) and Art. 64 (8)(b) RS providing a right to challenge and submit evidence exclusively for the parties to the proceedings, from a legal point of view, the decision was very innovative. Victims are participants in the proceedings, this is a novel position, which can neither be found in the civil legal tradition, nor in common law. Therefore, the Chambers struggled to define this unprecedented status, which had to be in some way distinctive of the position of the parties. This distinction was drawn with recourse to the requirement of a personal interest which has to be demonstrated in each case anew. Accordingly, in a previous decision the Appeal Chamber held that:

“More generally, an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.”⁴¹²

Thereby, they clarified that the interests of victims in the proceedings become personal in the sense of Art. 68 (3) RS and therefore legitimize victims to participate, when they do not fall within the interests implied in the role of the Prosecution. Along these lines, with respect to the relation of participating victims to the Judge Pikis, in his dissenting opinion, emphasized that:

“In relation to what can victims express their views and concerns? Not in relation to the proof of the case or the advancement of the defence. The burden of proof of the guilt of the accused lies squarely with the Prosecutor (article 66 (2) of the Statute). Provision is made in the Statute (article 54 (1)) for the Prosecutor to seek and obtain information from victims about the facts surrounding the crime or crimes forming the subject-matter of the proceedings. That the judicial process should follow its ordained course is a cause common to all; its sustenance is the responsibility of the Court, the guardian of the judicial process. It is not the victims' domain either to reinforce the prosecution or dispute the defence. Participating victims' views and concerns are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings.”⁴¹³

This quotation illustrates the difficulty of finding a decidedly distinct position in proceedings that are designed in an adversarial manner, in principle. With the Prosecution being responsible for the facts – the truth of the case. The Defence for rebutting this truth. And the Chamber for guaranteeing fair proceedings and for determining the truth beyond reasonable doubt and judging this truth according to the law – defining justice. Judge Pikis goes as far as to say, the victims share their interest with the rest of the world. Where then should victims be located in this amalgam of interests that are already distributed among the parties of the proceedings and its audience?

“The victims have no say in the matter. Their interest is that justice should be done, coinciding with the interest of the world at large that the criminal process should run its course according to law, according to the norms of a fair trial. Both the submission of evidence and its reception affect the parties to the adversity. It is not the victims' concern, a matter directly related to the

⁴¹² Appeals Chambers, Prosecutor v. Thomas Lubanga-Dyilo, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, para 28.

⁴¹³ Ibid., para. 16.

reception of evidence, to either prove or disprove the charges. The interests of justice are safeguarded by the Chamber [...]"⁴¹⁴

In contrast to this view, the initial decision of the Trial Chamber in Lubanga held that it is not the exclusive right of the parties to present and challenge evidence. They ascribe this conclusion to the Chamber's role to determine the truth, which is not restricted to the parties' evidence.

"The Trial Chamber considers that the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute. [...] It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has "requested" the evidence."⁴¹⁵

The victims' role, as foreseen by the Chamber, is assisting the Chamber in the determination of the truth and the Chamber states that,

"[...] there is no provision within the Rome Statute framework which prohibits the Trial Chamber from ruling on the admissibility or relevance of evidence having taken into account the views and concerns of the victims, in accordance with Articles 68(3) and 69(4) of the Statute. In appropriate circumstances, this will be allowed following an application."⁴¹⁶

Here, the Chamber combines its own power pursuant to Art. 69 (4) RS with the requirements of Art. 68 (3) RS and therefore links the right to tender and challenge evidence to the rationale of Art. 68 (3) RS, namely the presentation of views and concerns, when it is appropriate, the personal interests are affected and it is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial. This extension of rights, that is not expressly granted under the victim participation framework is once again attributed to the objective of participation to be effective and meaningful.

⁴¹⁴ Appeals Chambers, Prosecutor v. Thomas Lubanga-Dyilo, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, Separate opinion Judge Pikis, para. 19.

⁴¹⁵ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, para 108.

⁴¹⁶ Ibid., para 109.

“To give effect to the spirit and intention of article 68 (3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful. Evidence to be tendered at trial which does not pertain to the guilt or innocence of the accused would most likely be considered inadmissible and irrelevant. If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.”⁴¹⁷

The determination of the manner the victim representatives may tender, or challenge evidence are then confining the right to the requirements of Art. 68 (3) RS, which, according to the Appeals Chamber majority, is a sufficient safeguard to distinguish the interests of victims and the role of the Prosecution:

“The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the Appeals Chamber does not consider that the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is inconsistent with the onus of the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial.”⁴¹⁸

Judge Pikis, in contrast, referred the confines of the legal basis, which does not permit participants to proof or disproof the case and emphasized the adversarial character of criminal proceedings.

“The Prosecutor is the only authority the accused has to confront in relation to the charges. The two sides are locked into a conflict upon the denial of the charges by the accused. Neither the Trial Chamber nor the Pre-Trial Chamber is concerned with the collection of evidence. The Trial Chamber, as provided in article 69 (3) of the Statute, may request either party to submit all evidence that it considers necessary for the determination of the truth [...] An adversarial hearing casts the Prosecution and the defence in opposition, confronting one another in a process designed to determine whether the burden cast on the

⁴¹⁷ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para 97.

⁴¹⁸ Appeals Chambers, Situation in the Democratic Republic of Congo in the case of Prosecutor v. Thomas Lubanga-Dyilo, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, para 104.

Prosecution is discharged at the end of the day. Fair trial imports equality of arms...”⁴¹⁹

The victims’ role – domain - within this adversarial setting in which Prosecution and Defense fight over the truth and the Chamber is responsible for its final determination and to render justice, is then confined to their personal interests, that distinguish *the victims* from the parties, namely their loss or injury – their suffering.

“In relation to what can victims express their views and concerns? Not in relation to the proof of the case or the advancement of the defence. The burden of proof of the guilt of the accused lies squarely with the Prosecutor (article 66 (2) of the Statute). Provision is made in the Statute (article 54 (1)) for the Prosecutor to seek and obtain information from victims about the facts surrounding the crime or crimes forming the subject matter of the proceedings. That the judicial process should follow its ordained course is a cause common to all; its sustenance is the responsibility of the Court, the guardian of the judicial process. It is not the victims' domain either to reinforce the prosecution or dispute the defence. Participating victims' views and concerns are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings. The decision of the Appeals Chamber of 12 December 2006 supports this proposition. Victims have an interest that the loss or injury they have suffered, a matter of individual concern, should surface in the proceedings and be brought to light. Such evidence would presage any claim to reparations as well as illuminate the gravity of the crime.”⁴²⁰

Furthermore, “[t]he proof or disproof of the charges is a matter affecting the adversaries. The victims have no say in the matter. Their interest is that justice should be done, coinciding with the interest of the world at large that the criminal process should run its course according to law, according to the norms of a fair trial. [...] The interests of justice are safeguarded by the Chamber, trusted to ensure that only relevant and admissible evidence, in the context earlier defined, can be received in proceedings before it.”⁴²¹

As a consequence, according to Judge Pikis, the sole appropriate interest of “the victims” that distinguishes them from all parties and the Chamber, is their personal experience of the crimes – the harm suffered. Similarly, Judge Kirsch argues that the orderly conduct of the proceedings covering and protecting all interests of the parties

⁴¹⁹ Appeals Chambers, Situation in the Democratic Republic of Congo in the case of Prosecutor v. Thomas Lubanga-Dyilo, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, paras. 12, 14.

⁴²⁰ Ibid., para 15.

⁴²¹ Ibid., para 19.

and participants can only be safeguarded, when not confusing the role of the victims with that of the Prosecutor.⁴²²

The majority, however, held that although it is not the unfettered right of participants to lead and challenge evidence, it is an opportunity that is subject to the Trial Chambers authorization. Thereby they still exercise a control over this way of participation by conditioning it to the victims' interests which are thereby further defined in each decision. The initial uncertainties pertaining to the role of victims as participants in the courtroom were overcome by aligning their basic interest in truth and justice to that of the Chamber and putting their interventions under tight control by the latter.

The following Chambers developed criteria for the admission of leading and challenging evidence that are illustrative for this control. Every time the legal representatives want to tender or challenge evidence they must apply in writing indicating how the evidence in question is relevant and how it may contribute to the determination of the truth.⁴²³

“The Chamber recalls, in this respect, that the participation of victims in the fact-finding process of the Court is conditional upon their making a real contribution to the search for the truth.”⁴²⁴ The victims' interventions then may “enable the Chamber to understand some of the matters at issue, given their local knowledge and social and cultural background.”⁴²⁵ This requirement “to make a genuine contribution to the ascertainment of the truth” is emphasized by Trial Chamber III in Bemba.⁴²⁶ To ensure this contribution, the criteria developed to evaluate the contribution of victims is

“a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.

⁴²² Appeals Chambers, Situation in the Democratic Republic of Congo in the case of Prosecutor v. Thomas Lubanga-Dyilo, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, Separate opinion Judge Kirsch, para 24.

⁴²³ Trial Chamber II, Situation in the Democratic Republic of Congo in the case of Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, para 84.

⁴²⁴ Ibid., para 91.

⁴²⁵ Ibid., para 75.

⁴²⁶ Trial Chamber II, Situation in the Democratic Republic of Congo in the case of Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr, para 20, cited in Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v Jean Pierre Bemba, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, para 23.

- b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.
- c. Whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter.
- d. Whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.”⁴²⁷ These criteria are implicitly acknowledged in the following cases by the different Chambers.⁴²⁸

Since, as demonstrated above, the Prosecution is responsible for finding the truth, the Defense for rebutting it and the Chamber for ascertaining fair proceedings, determining the final truth and based in that for finding a judgement, the space attributed to *the victims* is beside the Chamber playing an assisting role in the determination of the truth. This has also consequences for the manner in which legal representatives of victims – the victims, as referred to in the decisions – might question witnesses.

4.3.2. Questioning witnesses

Whereas Rule 91 (3) RPEs generally authorizes legal representatives of victims to question witnesses it does not give any guidance on the admissible scope and mode of questioning. Furthermore, the right is subject to judicial authorization pursuant to

⁴²⁷ Trial Chamber II, Situation in the Democratic Republic of Congo in the case of Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr, para 30, cited in Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v Jean Pierre Bemba, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, para 24.

⁴²⁸ Trial Chamber V, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto and Joshua Sang, Decision in victims’ representation and participation, 3 October 2012, ICC-01/09-01/11, para 77; Trial Chamber V, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Decision in victims’ representation and participation, 3 October 2012, ICC-01/09-02/11, para 76; Trial Chamber IV, Situation in Darfur, Sudan in the case of the Prosecutor v. Abdallah Banda Abakaer Nourain, Decision on the participation of the victims in the trial proceedings, 20 March 2014, ICC-02/05-03/09, ICC-02/05-03/09, para 27; Trial Chamber VI Situation in the Democratic Republic of Congo in the case of the Prosecution v. Bosco Ntaganda, Decision on the conduct of the proceedings, 2 June 2015, ICC-01/04-02/06, paras 69-70; Situation in the Côte d’Ivoire in the case of the Prosecutor v. Laurent Gbagbo and Charles Blé Goundé, Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15, para 31.

Art. 68 (3) RS and Rule 91 (3)(b) RPE, as such the Chambers once again hold considerable discretion in this regard.⁴²⁹

The personal interest requirement provided for in Art. 68(3) RS hence confines the scope and mode of questioning and consequently is indicative of the representation of “the victims” and the respective role at the Court. In the first decision on the modes of victim participation at the ICC, the Trial-Chamber in Lubanga held that,

“[F]ollowing an initial determination (...) that the victim shall be allowed to participate in the proceedings, thereafter, in order to participate at any specific stage in the proceedings, e.g. during the examination of a particular witness or a discussion of a particular legal issue or type of evidence, a victim will be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of participation they seek.”⁴³⁰

Like described above, this link between the matter under consideration and the interest is mostly demonstrated by linking the harm suffered to the respective issues:

“During Trial, ‘the victim must describe the way in which his or her personal interest is affected, for example by identifying how the harm he or she suffered relates to the evidence or the issues the Chamber is considering.’⁴³¹

The first dealing with the modes and scope of questioning witnesses, took place in court session, in an oral decision of the same Chamber on the application of LRVs to question an expert witness. The problematic raised by the Defence, opposing the applications for reasons of a lack of interest of the represented victims, was that the matters under consideration were of general interest and therefore do not engage with the personal or individual interests of the victims. As a consequence, the Prosecution would be in a better position to address these interests, “the victims” should not “become a secondary body” to the Prosecution.⁴³² The Chamber in turn developed confining criteria while generally granting the applications of the victims’ legal representatives. They decided that whereas a general interest in the outcome of

⁴²⁹ Vasiliev (2015, pp. 1176–1177).

⁴³⁰ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para 96.

⁴³¹ Ibid., paras. 102-103.

⁴³² Transcript, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, 17 June 2009, ICC-01/04-01/06-T-193-ENG, p. 5.

the case does not suffice to justify a right to question witnesses, in this case the victims have

“...an undoubted interest in setting their personal experiences, and the harm it is said they individually experienced, in their true historical, economic, and social context [...] Therefore, the victims are entitled to explore such aspects of these background matters as are relevant to each of them provided, and to the extent, that the areas are relevant to, and are of assistance in, establishing the context in which the alleged crimes have been committed.”⁴³³

In conclusion they stated that the interests have to be personal but not unique or singular. They re-emphasize though that

“[I]t is critical that the areas of context and historical background have real relevance to the victims on whose behalf the questioning is being conducted. [...] Accordingly, this examination by participating victims will be confined to: (i) the issues and areas in which the victims have a personal interest; (ii) the context and history which is relevant to the charges the accused faces; and (iii), the matters within the expertise of Mr. Garreton. To date the questions by the representatives of victims have been proportionate, relevant, and focused, and notwithstanding the wide range of issues raised by these applications, this approach must be maintained.”⁴³⁴

In a subsequent decision the Chamber decided on the nature and manner of questioning through the LRVs in the case. Again, the position of victims within the proceedings - the position vis á vis the parties - is negotiated and their genuine role outside the traditional criminal legal framework - as participants, not parties - emphasized.

“The victims' legal representatives, however, fall into a category that is distinct and separate from the parties, and in this regard a description of the manner of questioning by the victims' legal representatives that uses the concepts of "examination in chief", "cross-examination" and "re-examination" is not necessarily helpful. This particular aspect of the proceedings at trial - the manner of questioning by the victims' legal representatives - is an example of the novel nature of the Statute, which is not the product of either the Romano Germanic or the common law legal systems. As participants in the proceedings, rather than parties, the victims' legal representatives have a unique and separate role which calls for a bespoke approach to the manner in which they ask questions.”⁴³⁵

⁴³³ Transcript, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, 17 June 2009, ICC-01/04-01/06-T-193-ENG, p. 7-8.

⁴³⁴ Ibid., pp 9-10.

⁴³⁵ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 September 2009, ICC-01/04-01/06-2127, para 24.

Referring to the Appeal Chambers' decision granting victims the right to lead and challenge evidence and the related elaborations on the role of victims beside the role of the prosecutor in the proceedings, the Chamber reiterates that, depending on the circumstances, the alleged guilt of the accused might legitimately fall within the personal interests of victims.⁴³⁶ Therefore,

“victims' legal representatives may, for instance, question witnesses on areas relevant to the interests of the victims in order to clarify the details of their evidence and to elicit additional facts, notwithstanding its relevance to the guilt or innocence of the accused.”⁴³⁷

This decision is, like the decision on leading and challenging evidence, based on the assumption that the role and position of the victims in the proceedings is “assisting the bench in its pursuit of the truth.”⁴³⁸ This link between the role of the legal representatives of victims in the proceedings and the power of the Chamber to determine the truth drawn by the Appeal Chamber “tends to support a presumption in favour of a neutral approach to questioning on behalf of victims. Putting the matter generally, they are less likely than the parties to need to resort to the more combative techniques of “cross-examination”. In certain circumstances, however, it may be fully consistent with the role of the victims' legal representatives to seek to press, challenge or discredit a witness, for example when the views and concerns of a victim conflicts with the evidence given by that witness, or when material evidence has not been forthcoming. Under such circumstances, it may be appropriate for the victims' legal representatives to use closed, leading or challenging questions, if approved by the Chamber.”⁴³⁹

In conclusion, generally, the Chamber derived from the object and purpose of questioning, namely assisting the Chamber in finding the truth, that the legal representatives are confined to a neutral form of questioning, unless otherwise suggested by the personal interests of “the victims”.⁴⁴⁰ The image of “the victims”, in contrast to the parties is outlined as interested only in the truth - not as combative.

With regard to the concrete procedure in the courtroom, the legal representatives have to make an oral request when they wish to depart from the neutral style.⁴⁴¹ The alignment qua definition of “the victims” with an interest in truth is furthered by the position that is ascribed to the victim representatives in the courtroom. Beside the interest in truth, which “the victims” allegedly share with the Chambers, it is a certain

⁴³⁶ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 September 2009, ICC-01/04-01/06-2127, para 25.

⁴³⁷ Ibid., para 26.

⁴³⁸ Ibid., para 27.

⁴³⁹ Ibid., para 28.

⁴⁴⁰ Ibid., para 29.

⁴⁴¹ Ibid., para 30.

truth, “the victims” are supposed to contribute to with their knowledge, which helps the Judges to understand the matters at issue - social and cultural knowledge. When finding (creating) a special position for “the victims” in the courtroom and allocating different interests to them. Often Chambers come to the conclusion that “the victims” provide local and cultural knowledge that could frame the truth heard at The Hague.

“The Chamber recalls that such questioning must have as its main aim the ascertainment of the truth, since the victims are not parties to the trial and have no role to support the case of the Prosecutor. However, their intervention may potentially enable the Chamber to better understand some of the matters at issue, given their local knowledge and social and cultural background.”⁴⁴²

Providing this knowledge and assisting in finding the truth is nevertheless a very restricted endeavor for the victims’ representatives. The criteria developed by the Chamber in Katanga, which applied the strictest regime is yet again an expression of the extent of control exerted vis á vis the participating victims, even when it is only their representatives speaking in the courtroom. It can be understood as a continuance of the neat control over the selection of the representatives themselves. The legal representatives of victims,

“will have an opportunity to question witnesses after the Prosecution’s examination-in-chief or after its cross-examination of a Defence witness. Any application for this purpose must state how the intended question is relevant and must comply with the procedure defined by the Chamber in the Decision on Rule 140, whether for questions under article 75 of the Statute, anticipated questions or unanticipated questions. The questions which the Legal Representatives may put must essentially relate to points to clarify or supplement evidence already given by the witness. Accordingly, a neutral style of questioning should be adopted.”⁴⁴³

Consequently, the legal representatives, in case of anticipated questions, have to file a request each time they want to question a witness on a matter related to Article 75 RS. They have to clarify the scope and purpose of questioning and how it relates to the interests of “the victims”.⁴⁴⁴ If, after the examination-in-chief of the witness in question, the Chamber is of the view that the matters raised by the legal

⁴⁴² Trial Chamber II, Situation in the Democratic Republic of Congo in the case of Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 22 January 2010, ICC-01/04-01/07-1788-tENG, para 75.

⁴⁴³ Ibid., paras. 77-78..

⁴⁴⁴ Trial Chamber II, Situation in the Democratic Republic of Congo in the case of Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009, ICC-01/04-01/07-1665, paras. 84, 87.

representatives in their request has not been sufficiently addressed, it may authorize the legal representative to pose questions before cross-examination.⁴⁴⁵ In case of unanticipated questions which nevertheless go to the personal interests of victims, the question of the legal representative is put to the witness through the Chamber, if the latter considers it necessary for the ascertainment of the truth or for clarification of the testimony.⁴⁴⁶ Concerning the scope of questioning, the Chamber in Katanga concurs with Trial Chamber I in Lubanga in deciding it should be in principle limited to questions clarifying the evidence.⁴⁴⁷ Questions that go beyond these confines are subject to the conditions that:

“a) Questions may not be duplicative or repetitive to what was already asked by the parties.

b) Questions must be limited to matters that are in controversy between the parties, unless the Victims' Legal Representative can demonstrate that they are directly relevant to the interests of the victims represented.

c) In principle, Victims' Legal Representatives will not be allowed to ask questions pertaining to the credibility and/or accuracy of the witness' testimony, unless the Victims' Legal Representative can demonstrate that the witness gave evidence that goes directly against the interests of the victims represented.

d) Unless the Chamber specifically gave authorisation under regulation 56 of the Regulations, Victims' Legal Representatives are not allowed to put questions pertaining to possible reparations for specific individuals or groups of individuals.”⁴⁴⁸

Again, the questions should be posed in a neutral manner, exceptions must be authorized by the Chamber on a case to case basis.⁴⁴⁹

The Katanga approach was so far the strictest regime with regard to questioning. The Bemba Trial Chamber mainly referred to the jurisprudence of Trial Chamber I in Lubanga, holding that “although there are slight differences in the formulation of the approach adopted respectively by Trial Chambers I and II, the underlying

⁴⁴⁵ Trial Chamber II, Situation in the Democratic Republic of Congo in the case of Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009, ICC-01/04-01/07-1665, para 88.

⁴⁴⁶ Ibid., para 89.

⁴⁴⁷ Ibid., para 90.

⁴⁴⁸ Ibid., para 90.

⁴⁴⁹ Ibid., para 91.

position is the same.”⁴⁵⁰ The following decisions on questioning all in principle confirmed the developed approach.⁴⁵¹ In the Kenyan cases, the questioning were conducted by the OPCV acting on behalf of the legal representatives. The questions have to be relevant to the victims interests, they shall not be repetitive and no new allegations against the accused are to be formulated.⁴⁵² The questioning shall be conducted in a neutral form. The seven days deadline for the required application is not mentioned. It is notable, that in the later decisions on questioning are not specifically on the participation of victims any longer, but entailed in the general decision on the conduct of the proceedings, determining the schedule of the trial, the admission of evidence and the conduct of all parties and participants. This is a sign for the normalization of the participation of legal representatives within the courtroom. This normalization and the legal tradition of the Presiding Judge might have lead to the developments in the latest decisions on the conduct of the proceedings. The German Judge in the Ongwen case decided to not regulate the questioning of witnesses in the abstract - for neither parties, nor participants. The distinction between examination in chief, cross-examination and re-examination is not foreseen.

“The necessity and propriety of any particular question will be dealt with on a case-by-case basis, noting the Presiding Judge’s obligation to (a) make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth and (b) avoid delay and ensure the effective use of time.”⁴⁵³

⁴⁵⁰ Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision in the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 30 June 2010, ICC-01/05-01/08-807, para 40.

⁴⁵¹ Trial Chamber IV, Situation in Darfur, Sudan in the case of the Prosecutor v. Abdallah Banda Abakaer Nourain, Decision on the participation of the victims in the trial proceedings, 20 March 2014, ICC-02/05-03/09, paras. 31-33; Trial Chamber VI, Situation in the Democratic Republic of Congo in the case of the Prosecution v. Bosco Ntaganda, Decision on the conduct of the proceedings, 2 June 2015, ICC-01/04-02/06, para 22; Trial Chamber I, Situation in the Republic of Côte d’Ivoire in the case of Prosecutor v. Laurent Gbagbo and Charles Blé Goundé, Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15, para 37.

⁴⁵² Trial Chamber V, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto and Joshua Sang, Decision in victims’representation and participation, 3 October 2012, ICC-01/09-01/11, paras. 74-76; Trial Chamber V, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Decision in victims’representation and participation, 3 October 2012, ICC-01/09-02/11, paras. 73-75.

⁴⁵³ Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Dominic Ongwen, Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15, para. 5. The same approach is taken by the Trial Chamber in the Mahdi case, but this trial was special because of the accused’s guilty plea: Trial Chamber VIII, Situation in the Republic of Mali in the case of the

5. Conclusion

In the decisions on the definition of victims who are allowed to participate in the proceedings, the subject position of “the victims” was gradually shaped according to the requirements of the court. Firstly, “the victims”, in general, are defined to have a (natural) interest in finding the truth, being rendered justice and receiving reparations. This abstract interest is then appropriated to the clarification of facts, punishment and reparations. Since these are still general interests, a link has to be established between the specific victims and the ascribed interests. What renders an applicant into a victim is the harm suffered, which must be causally and directly linked to the crime under consideration. The subject position of “the victims” is thereby constructed to always already be interested in the truth and justice delivered by the ICC and more specifically, in the judgement of the respective Chambers. As a consequence of this construction of “the victims”, trying to find a space for “the victims” represented by their lawyers within the proceedings beside the parties and the Chamber becomes impossible. Since the Prosecution is responsible for the facts constituting the truth, the Defense rebuts these facts with their own facts and the Chamber determines the truth and renders justice in the form of a judgement and sentence, all defined interests that are naturally attributed to “the victims” are already served. In order to still provide a meaningful role for “the victims” they are allocated the assisting role in the truth finding mission of the court by contributing with what distinguishes them - their harm suffered and their local and cultural knowledge. The modalities of assisting are tightly controlled by the Chamber ensuring that no inappropriate interest can be articulated within the proceedings. Therefore, “the victims” who are defined to have an interest in ICC style truth and justice are not allowed to shape truth and justice - they are expected to be delivered with it by the Prosecution and the Chamber. The extent to which they shape truth and justice is limited to neutrally questioning beyond this they are the representatives of harm suffered and culture.

These limitations are in contrast with the normative claims attributed to the right to truth and justice in the first decisions, namely providing victims of mass atrocities

Prosecutor v. Ahmad Al Faqi al Mahdi, Directions on the Conduct of the Proceedings, 22 July 2016, ICC-01/12-01/15, para. 3.

with an active role within the proceedings, independent of that of the Prosecution.⁴⁵⁴ Just like the development of the application process and the selection of LRVs, firstly, the Chambers establish general norms, often referring to international human rights law and general principles of law, to then gradually undermine these general normative claims through the interpretation of the very same norms.

An interrelated development that can be observed is the search for a place in the courtroom, - a role within the proceedings - in the course of the process of institutionalization of victim participation. The Chambers in the beginning were struggling to legally conceptualize the role of participants in contrast to parties to the proceedings which, already due to the wording, has to be somehow distinct. The distinction was drawn primarily vis á vis the Prosecution in the decisions on the modalities of participation, namely the right to lead and challenge evidence, which is a genuine right of the parties and in the decisions on the questioning witnesses in the courtroom. Interestingly, the alleged interests of “the victims” that were guiding in the decisions if, and how victims may participate, were compared to that of the Judges - namely determining the truth. On the one hand, this again speaks for the alignment of the definition of interests with the objective of the Court - the search for truth. On the other hand, the role of victims can hardly be called independent anymore, and is factually under the control of the Judges, who decide whether the requested evidence goes to the interests of victims and contributes to the truth, because legally, the Chamber is requesting the submission of the evidence that it considers necessary for the determination of the truth pursuant to Art. 69 (3) RS. “The victims” special role is restricted to assisting the Chamber in better understanding the *socio-cultural background* of the case to which their *local knowledge* enables them.

Apart from this, the modes of intervention by “the victims” - meaning their legal representatives - in the courtroom are tightly controlled, similar to the selection of representatives. Nevertheless, with the normalization of having the legal representatives of victims in the courtroom, in the course of the time, the control was loosened and the requirements for questioning became less strict. This is also an

⁴⁵⁴ See this Chapter 6, 3.1.

effect of institutionalization, once the positions and procedures are stabilized, the order is fixed and the unexpected (excess) excluded - the control can be loosened.

Chapter 7: Subject II

1. From “the victims” to “the relevant victims”

“On that day we were 12 people from various neighbourhoods. ... The second time we were called up again. Some other people did not show up, but I showed up. Today I am alone, but the other people who had been called up alongside me the first time are not here.”⁴⁵⁵

This Chapter deals with the pre-conditions for directly addressing the court, the criteria for, and corresponding practice of, being heard personally within the legal framework. The criteria developed are essential in defining the subject position victims have to assume when testifying or presenting views and concerns in the proceedings. As developed before, the subject position of “the victims” is confined by distinguishing it from the position of the parties in the proceedings. Accordingly, hardly any space is left for “the victims” beside the truth finding mission of the Chamber, the fact-finding mission of the Prosecution and the fact rebutting mission of the Defence. Moreover, the Chambers, from the very beginning, clarified that, in principle, victim participation takes place through legal representation. This means that the legal representatives, in general, speak for and on behalf of “the victims” in the courtroom. Against this backdrop it is not surprising that the Chambers were very reluctant to grant participants to present views and concerns in person, stating that for reasons of language, security and expediency legal representation might be the better way of presentation.⁴⁵⁶ In fact, out of 2287 acknowledged victims who, at that time, participated in the Bemba trial, two were admitted to travel to The Hague to testify and three were allowed to present views and concerns in person via video link from Bangui.⁴⁵⁷ Trial Chamber I granted the request of three participants out of 129 (their testimony was subsequently dismissed as unreliable) and Trial Chamber II granted four out of 370 (two of which were considered unreliable even before their

⁴⁵⁵ Presentation of views and concerns a/30169/15, Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, p. 52.

⁴⁵⁶ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on victims' participation, 18 January 2008, ICC 01/04-01/06-1119, para. 116.

⁴⁵⁷ Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, partly dissenting opinion Judge Steiner, para 22.

testimony).⁴⁵⁸ In the Ntaganda proceedings, the legal representative requested to call nine participants as witnesses and four as victims to present views and concerns in person.⁴⁵⁹ The Chamber decided to authorise the presentation of evidence by two participants and the presentation of views and concerns of six participants.⁴⁶⁰

Initially, the opportunity to present views and concerns in person as a right enshrined in Art. 68 (3) RS was celebrated as the milestone in providing a meaningful role for victims in international criminal proceedings (See Chapter I). It was this way of participation which distinguished the role of victims at the ICC from the role of victims at its predecessors. The main criticism of the ad-hoc tribunals regarding its relation to victims of the tried atrocities was the restricted and potentially re-traumatizing position provided for the victims within the proceedings, namely the role as witnesses. Those who are victims of the crimes and called as witnesses are called fact witnesses:

“Fact witnesses have knowledge and testify about what happened. They can be crimes-based witnesses when they have suffered harm and testify as witnesses about what happened to them. Some of these witnesses can also hold the status of participating victims before the Court; they are called dual-status witnesses.”⁴⁶¹

Witnesses are called by either party to proof their respective cases. They serve to support the narration of the crimes determined by the parties and have no agency with regard to the narrative shaped. They serve as corroborating evidence to build a case and are therefore objectified to serve the needs of others. Now, with the introduction of victim participation at the ICC, participants should be enabled to submit their own stories, to shape the proceedings as subjects. The legal means are provided for in the form of the presentation of views and concern.

⁴⁵⁸ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on victims' participation, 18 January 2008, ICC 01/04-01/06-1119, para. 116; Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, para 60.

⁴⁵⁹ Trial Chamber VI, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, Public redacted version of 'Decision on the request by the Legal Representative of the Victim of the Attacks for leave to present evidence and victims' views and concerns', 15 February 2017, ICC-01/04-02/06, para 3.

⁴⁶⁰ Trial Chamber VI, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, Public redacted version of 'Decision on the request by the Legal Representative of the Victim of the Attacks for leave to present evidence and victims' views and concerns', 15 February 2017, ICC-01/04-02/06, para 59.

⁴⁶¹ <https://www.icc-cpi.int/about/witnesses>. Last accessed 05/06/2018.

Whereas in principle this right is exercised through the legal representatives, some participants are allowed to address the court personally through the presentation of their views and concerns. As has been described before, by way of linking Art. 69 (3) RS and the authority of the Chamber to request the submission of evidence that it considers necessary for the determination of the truth to the requirements of the presentation of views and concerns pursuant to Art. 68 (3) RS, the Chambers implicitly acknowledge that a way of presenting views and concerns is testimony. Interestingly, in the first cases before the ICC, Lubanga and Katanga, the Chambers considered testifying to be more meaningful than simply presenting views and concerns. The line of argumentation was, that by giving evidence the victims contributed to the legally relevant truth, since only witnesses testify under oath and are exposed to cross-examination and their testimony can therefore become part of the judgement.⁴⁶² The meaningfulness of participation was measured by the legal effect of the testimony in contrast to presenting views and concerns. For these reasons, in the first cases, the few participants who were granted the right to appear before the Court in person were allowed to testify and thereafter, if granted, to present views and concerns as well. The first case where participants were only invited to present views and concerns was Bemba.⁴⁶³ Now in Ntaganda, following the Bemba approach, there is a distinction between participants who testify and those who present their views and concerns in person.⁴⁶⁴

This development is interesting for two reasons: Firstly, initially, “the victims” were once again confined to objects of the criminal proceedings, namely witnesses who deliver testimony that is asked of them by their legal representatives and the other parties. Secondly, eventually, this confinement was abandoned and “the

⁴⁶² Appeals Chamber, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para 97; Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, para 60.

⁴⁶³ Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138; Trial Chamber VI, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, Public redacted version of ‘Decision on the request by the Legal Representative of the Victim of the Attacks for leave to present evidence and victims’ views and concerns’, 15 February 2017, ICC-01/04-02/06.

⁴⁶⁴ Ibid., para 59.

victims”, by presenting views and concerns in person, in theory, assume a subject position. The representation of “the victims” described hitherto which was distanced from the Court through the practice of representation, externalization and collectivization is confronted with individual participants. The participating victims, who initially signed to be represented by “the victims” in their applications, are now allowed to address the court in person. Hence, the practice of testifying and presenting views and concerns in person, is illustrative of an encounter of the representation of “the victims” and the actual individual participating victim. Furthermore, it is an encounter of the Court, which is in need of a certain representation of “the victims” for its self-legitimization, with the actual victims. The tension implied in these encounters manifest in the control by the Chamber and parties when demanding from the individual participants to comply with the representation of “the relevant victim” and the reactions of the individuals when trying to speak and being heard beyond this representation. Furthermore, in theory, the Court encounters the traumatic memory as narrated by the individual victims themselves. It will be seen however, that the confinements of the subject position and the related restricted concept of trauma, that was shaped in the legal practice of the court, effectively structure the way victims speak and are being heard, with hardly any space for irritation.

In the following, the practice of speaking and being heard through testifying and presenting views and concerns is unfolded in three steps. Firstly, the criteria for selecting those participants who are authorized to appear in person are analyzed (2.). The criteria are indicative of the subject position that is required to be heard at the court - it is the position of “the relevant victim”. In a next step, the actual practice of testifying (3.) and presenting views and concerns (4.) is analyzed. The encounters between the Court and the actual individual victim and their traumatic memory within the practice of testifying and presenting views and concerns will be analysed. At the same time these situations are an encounter of the actual participants with the subject-position of “the relevant victim” that frames speaking and hearing. The truth about their traumatic memory is legally framed. The irritations these encounters produce manifest in specific ways that will be unfolded.

2. The criteria for speaking and being heard

Like indicated in the previous chapter, the criteria for presenting views and concerns in person, be it via testimony or not, are very strict. The Chambers, with slightly varying reasoning, all developed similar requirements. In order to preserve the stability of the legal proceedings, the Chamber in Lubanga, felt the necessity to remind the parties and participants that “this is a Court of law” and that the criminal legal proceedings are a speciality for lawyers who talk the legal language and thus know how to adequately talk about *very difficult things that have happened*:

“It needs to be remembered that this is a Court of law and, in particular, this is the criminal trial of the accused, and the presumption is that those who participate in the proceedings will be lawyers, lawyers acting for individuals or for bodies, for entities. If individuals are to be allowed to participate in person, there would have to be cogent, indeed powerful, reasons for that exceptional course [...] because [...] people without legal training coming to talk about very difficult things that have happened to them could have a real capacity for destabilising these Court proceedings.”⁴⁶⁵

In the initial decision on victim participation, the Chamber held that participation is, for reasons *of language, security, or expediency*, better exercised through common legal representation.⁴⁶⁶

Less drastic, the Chamber in Katanga held that in order to ensure expeditious proceedings that are not prejudicial to the rights of the accused and a fair and impartial trial, the possibility of victims to testify is subject to limitations.⁴⁶⁷ Thereby the Chamber referred to the restricting requirements of Art. 68 (3) RS. Referring to the Lubanga ruling, only those victims are allowed to testify whose testimony will not “undermine the integrity of the proceedings.”⁴⁶⁸

⁴⁶⁵ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 26 June 2009, ICC-01/04-01/06-2032-Anx, para 23.

⁴⁶⁶ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on victims' participation, 18 January 2008, ICC 01/04-01/06-1119, para. 116.

⁴⁶⁷ Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr, paras. 21-22.

⁴⁶⁸ Ibid., para 24.

From a theoretical viewpoint it is remarkable that the Chamber considered it necessary vis à vis the individual victims to re-iterate that the ICC is a Court of law and that the victims – not knowing how to speak their language – have the capability to destabilize the process, endanger the integrity of the proceedings. The decision thereby justifies its exclusiveness and determines that only few victims can participate. The criminal legal process has to be exclusive in order to remain stable. And the stability is obtained by ensuring that participants in legal proceedings have legal training - speak the legal language. Victims, when they are not represented by a lawyer, not knowing how to speak adequately “about very difficult things that have happened to them” have the capacity to destabilize the proceedings. The *very difficult things that have happened to them*, will mostly be the traumatic violence, the individual victims are asked to talk about. Implicitly, thereby, the Chamber in Lubanga anticipates the destabilizing effect of traumatic memory - that is not complying with legal requirements of speaking. In order to prevent this destabilization of the legal symbolic order by the traumatic memory, the Chambers developed and applied a strict regime.

In the Bemba proceedings, initially, the legal representative of victims requested to call 17 victims to participate, which was according to the parties “excessive”, “unnecessary and disproportionate”, thereupon, the Chamber asked the legal representative to reduce the number to maximum eight “relevant victims”.⁴⁶⁹ Distinguishing views and concerns and testimony, Chambers held that,

“[T]he former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their legal representatives) will not form part of the trial evidence. In order for the victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box.”⁴⁷⁰

⁴⁶⁹ Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, partly dissenting opinion Judge Steiner, paras 3-4.

⁴⁷⁰ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 26 June 2009, ICC-01/04-01/06-2032-Anx, para 25; Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, para 19.

Consequently, the different modes of presentation of views and concerns are governed by different requirements which are elaborated upon separately below. Referring to the requirement of being a “relevant victim” however, the Chamber in Bemba developed common criteria for those victims who are authorized to address the court in person and who are consequently entitled to have an own voice in the proceedings:

“The Relevant Victims should be those who, in the Legal Representatives' view, are (i) best-placed to assist the Chamber in the determination of the truth in this case; (ii) able to present evidence and/or views and concerns that affect the personal interests of the greatest number of participating victims; (iii) best-placed to present testimony that will not be cumulative of that which has already been presented in this case; and (iv) willing for their identity to be disclosed to the parties in the event that they are permitted to testify and/or present their views and concerns.”⁴⁷¹

In general, only “the relevant victims” are entitled to participate in person, since the criteria they have to fulfil ensures that the proceedings are not destabilized: They have to be themselves representative for as many victims as possible, what they have to say must be relevant to the charges and assist the Chamber to find the truth and the presentation of their views and concerns must not repeat what has already been discussed. Within this tight framework of “the relevant victim” the practice of personal participation is exercised. Accordingly, this framework determines the subject position of “the relevant victim” which is hearable within the proceedings at the ICC. The individual participants have to assume this position in order to make sense in the proceedings. The unpredictable, excessive and challenging structure of trauma and violence is thereby precluded.

This exclusionary practice with regard to participants causes discontent, not only among victims' interest groups.⁴⁷² Judge Steiner drafted a strong dissent to the “Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims”.⁴⁷³ The dissent indicates the

⁴⁷¹ Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, 21 December 2011, ICC-01/05-01/08-2027, para 12.

⁴⁷² fidh. “Five Myths About Victim Participation in ICC Proceedings.”, December 2014, <https://www.fidh.org/IMG/pdf/cpi649a.pdf>, last accessed 26/6/2015; Garbett (2013).

⁴⁷³ Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the supplemented applications by the legal representatives of

disproportion of the practice and hence suggests a certain lack of contact with the reality of the disturbing potential of victim participation so far.

“Before turning to the factual and legal basis underpinning my partly dissenting opinion, I wish to recall that the number of victims participating in the Bemba case is unprecedented in this Court. To date, a total of 2287 victims have been authorised to participate in the proceedings and a further 2903 applications are presently pending before the Chamber. For the purpose of ensuring effective and expeditious trial proceedings, all participating victims are represented by two legal representatives.

Furthermore, it must be recalled that victims authorised to participate in the proceedings have been allowed, through their legal representatives, to question witnesses under the conditions imposed by the Chamber in its Corrigendum to Decision on the participation of victims in the trial, on 86 applications by victims, made to date, to participate in the proceedings and in its Decision on Directions for the Conduct of the Proceedings and that at no point can their participation be seen as having had a negative impact on the expeditiousness of the trial.”⁴⁷⁴

This indicates that the majorities’ decision is not based on the actual disturbing experiences with victims and their representatives, but is rather a fear that is based on a certain image/projection of the victim. This is further supported by Judge Steiners view, that the decision is based on criteria lacking the legal or factual basis:

“In my view, the strict limitations imposed by the Majority to the presentation of evidence by victims and the "case-by-case" analysis of the victims' right to present their views and concerns reflect a utilitarian approach towards the role of victims before the Court, which has no legal basis and appears to unreasonably restrict the rights recognised for victims by the drafters of the Statute.”⁴⁷⁵

She confronts the decision with the abstract holding that victims are entitled to participate meaningfully, thereby, she reveals the inherent problem of all fresh judgement and calls into question that the decision taken on the basis of this abstract rule 68 (3) of the Rome Statute is a justified decision. She then re-considers the abstract term of meaningful participation as a victims’ interest and thus challenges the justice of the decision taken by the majority.

victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, partly dissenting opinion Judge Steiner.

⁴⁷⁴ Ibid., paras 8-9.

⁴⁷⁵ Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, partly dissenting opinion Judge Steiner, paras 8-11.

“It is my understanding that the concept of "meaningful participation" needs to be interpreted as a right conferred to the victims, and not as an useful tool for the parties or even the Chamber. It implies that victims have an independent voice in the trials, a "right to be heard" which, in my view, constitutes one of the most significant features of the proceedings before the International Criminal Court. As a result of this interpretation which, in my view, is the only one compatible with the statutory framework, I am forced to disagree with the criteria set out in paragraphs 23 to 25 of the Decision. For the same reasons, I cannot agree with the conclusion that, as decided by the Majority, the victims' testimony would not "contribute" to the proceedings on the basis of a hypothetical risk of unduly delaying the trial, and with the Majority's decision to reject the major part of the requests formulated by the legal representatives.”⁴⁷⁶

What forced Judge Steiner to disagree (again the language is quite strong) is the justice gap she perceived with regard to “the relevant victim”. Where the gap becomes intolerable – the exclusionary violence within the decision is revealed and subsequently the gap is closed again by another decision taken by Judge Steiner in this instance. Once more, the space for victims within the proceedings is negotiated referring to the *meaningfulness* of participation, which is linked to *having a voice* and *being heard* as opposed to being useful within the legal framework. Judge Steiner indicates that speaking and hearing are confined by the subject position of “the relevant victim”. Furthermore, she shows that the majority’s approach is utilitarian, which is exactly what was criticised about the role of witnesses at the ad-hoc tribunals. This is then confronted with the *right to be heard*. As mentioned, she indicates that the space of being heard is narrowed by the utilitarian notion of “the relevant victim”. Accordingly, the questions that will be dealt with in the following are:

How do these criteria effect the actual practice of testifying? How does the frame of the subject position of “the relevant victim” entitled to give testimony determine the way of giving testimony - of speaking and how does it frame what is being perceived - being heard? And how does this position differ from the subject-position provided for participants who present views and concerns in person?

⁴⁷⁶ Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, partly dissenting opinion Judge Steiner, paras 22, 25.

3. Evidence – the relevant witnesses

The criteria developed by the respective Chambers differed slightly according to the mode of presentation - testimony, or presenting views and concerns. As has been said above, in the first decisions, the Chambers granted one to two participants the right to testify under oath, because this was considered to be more meaningful within the legal framework of speaking. In a legal sense the victims are only heard, when they give testimony since only then, “the victims” truth can become part of the judgement. After giving testimony, the Chambers reserved the possibility to grant to present views and concerns. Therefore, the distinction did not become important. The requirements for testifying are:

“a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.

b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.

c. Whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter.

d. Whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.”⁴⁷⁷

These criteria are implicitly acknowledged in the following cases by the different Chambers.⁴⁷⁸

⁴⁷⁷ Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr, para 30, cited in: Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v Jean Pierre Bemba, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, para 24.

⁴⁷⁸ Trial Chamber V, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto and Joshua Sang, Decision on victims’ representation and participation, 3 October 2012, ICC-01/09-01/11, paras. 77; Trial Chamber V, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Decision on victims’ representation and participation, 3 October 2012, ICC-01/09-02/11, para 76; Trial Chamber IV, Situation in Darfur, Sudan in the case of the Prosecutor v. Abdallah Banda Abakaer Nourain, Decision on the participation of the victims in the trial proceedings, 20 March 2014, ICC-02/05-03/09, para 27; Trial Chamber VI, Situation in the Democratic Republic of Congo in the case of the Prosecution v. Bosco Ntaganda, Decision on the conduct of the proceedings, 2 June 2015, ICC-01/04-02/06, paras 69-70; Trial Chamber I, Situation in the Republic of Côte d’Ivoire in the case of

Once again, participants when providing testimony have to find a position beyond the Prosecution, since their testimony should not be repetitive. Nevertheless, the matters have to be related to the charges brought against the Accused by the same Prosecution. In this respect the testimony has to make a substantial contribution to the assessment of the charges and at the same time be representative of as many victims as possible. Hence, on the one hand, participants need to contribute exactly to the truth acquired by the Chamber based on the facts brought by the Prosecution and the Defense, on the other hand, they have to contribute something unique. Furthermore, what makes the victims “relevant” is their representativeness of as many other victims. They have to be unique and ordinary at the same time. As evidence they are treated as objects within the proceedings, serving to illuminate the legal truth, as victims they are supposed to be subjects in the proceedings and assist the Chamber. This somewhat contradictory subject position - between object and subject and the confining requirement of being relevant to the charges manifests differently within the practice of testifying. Moreover, since the witness-object is confronted with the victim-subject (3.1.) and the required relevant truth with regard to the charges (the appropriate narrative for trauma) is confronted with the individual traumatic memory (3.2.). Trauma has to be turned into evidence (3.3.) requiring a causal connection to the crime in question (3.4.) This causes irritations, since the legal framework shaping the subject position and the appropriate traumatic truth is from time to time challenged by the testifying victims (3.5.). These irritations are indicative of the lack and excess of the *relevant victim* and the impossible closure and confinement of trauma within the legal framework.

3.1. Mr. and Ms. Witness - we ask, you answer.

While being addressed as the victim in the application forms, “the victims” who are deemed relevant by the Chambers are, when testifying, addressed as Mr. and Ms. Witness.⁴⁷⁹ The de-individualization by collectivization and representation that was already characteristic of the practice of representation, is therefore continued. In some cases this is due to security reasons, when the testifying victim is a protected

the Prosecutor v. Laurent Gbagbo and Charles Blé Goundé, Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15, para 31.

⁴⁷⁹ See, by way of example, Testimony of a/0225/06: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, 12 January 2010, ICC-01/04-01/06-T-225-Red-ENG, p. 3.

witness. In other cases it is not necessary for security reasons, but applied anyway. Before every testimony, the Judges ask the testifying participants if they could call them Mr, or Ms. Witness, throughout the questioning. The appellation links the subject position directly to the function of the victims required by the court. This is illustrative of the utilitarian approach as criticized by Judge Steiner in her dissenting opinion. The victims who come to testify agree to serve as evidence and to being addressed accordingly. Most witnesses complied. But one witness denied being called Mr. Witness and insisted on being called by his first name:

“Q: “Would you be so kind throughout your questioning if I could call you “Mr. Witness”? Would that be agreeable to you?”

A. “My name is Judes and I’d like to be called by my first name”

Q: “That is understood. I will call you “Mr. Judes.” Is that ok by you?”

A. “ I agree.””⁴⁸⁰

Mr. Judes Mbetingou wants to be called by his first name - unlike Judge Steiner expresses - this is just not understood. For the rest of the testimony the first name is taken as the last name. This illustrates that the legal unimportance of the actual name of the witness and the related irrelevance of the individuality of the witness in the proceedings structures hearing within the courtroom. For the sake of formality that has to be maintained in the proceedings, the testifying witness cannot be called as he wished - Judes - but is referred to as Mr. Judes.

“Q: Thank you, Witness - I mean, Mr. Judes...”⁴⁸¹

Whenever a witness testimony transgresses the legally confined hearing with what he or she says, it is either not understood, expressly rejected as irrelevant or adjusted according to the respective requirements - either ways, it is not heard. The testifying individuals have to provide the legally relevant information that are confined by the charges brought against the Accused. This objectivization manifests in little slips by the parties:

“Mr. Haynes: Yes. Well, that will enable us to conclude with the witness today.

⁴⁸⁰ Testimony of Judes Mbetingou: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 3 May 2012, ICC-01/05-01/08, p. 44.

⁴⁸¹ Testimony of Judes Mbetingou: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 4 May 2012, ICC-01/05-01/08, p. 5.

Presiding Judge Steiner: Conclude with the testimony, I understand.

Mr. Haynes: Yes, sorry.”⁴⁸²

Witnesses are concluded with, when the Prosecution, Defence or LRVs got the information, they decided is relevant to the case. Questioning, in this context, is retrieving information, it is just no dialogue where one party wants to really know the other parties position. Accordingly, it is a unilateral situation, where the roles are fixed to those who question and those who answer. Whenever a witnesses breaks with this rule of only being allowed to answer whatever questions are posed to them, they are reminded of their function as information providers:

“Q: Madam Witness, you’re not allowed to ask me questions, ...”⁴⁸³

“Judge Steiner: ... When it’s time for the Defence, or the Prosecution first, to put questions to you they may refer again to the video but for you, as a witness, it’s not important to know who made this video. This is for the Judges to consider at the end of the case. The Judges will analyse the origin of the video.”⁴⁸⁴

Even further, the witnesses subject position is reiterated – “for you, as a witness, it’s not important to know”. Although, the witness – Jude – expressly asked who made the video, he was supposed to give information about, and therefore demonstrated his interest in knowing, Judge Steiner recalled that as a witness this is not important. Since, it is the Judges concern within the proceedings. As Jude, this might be his interest, as a witness, it is not. And Jude is only heard as a witness.

The same disciplining regime is applied by the Judges and the parties when a witness is addressing issues that are beyond the relevant information – the unique information - defined by the Chambers:

“Judge Femr: Sorry, Mr. Witness. I have to interrupt you. Mr. Seprun, I understand that you need some introductory passage before you reach the core of the testimony, but as we, the Chamber, several times emphasised this. Those witnesses, three witnesses that you proposed have been invited to come because their testimony is somewhat unique. But the history of the conflict, you

⁴⁸² Testimony of Jude Mbetingu: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 3 May 2012, ICC-01/05-01/08, p. 23.

⁴⁸³ Testimony of CAR-V20: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 2 May 2012, ICC-01/05-01/08, p. 42.

⁴⁸⁴ Testimony of Jude Mbetingu: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 7 May 2012, ICC-01/05-01/08, p. 8. This was after Mr. Mbetingu was repetitively asked about the video, which he thought to be fabricated. He asked where this video came from. In their Judgement, the Judges concurred with this opinion.

know, we have listened to many witnesses on that topic. So I would like to skip this topic and focus on those parts of the testimony which are unique to this witness, please.”⁴⁸⁵

3.2. Truth

According to the legal framework developed by the Chambers, the *relevant victim* provides relevant (unique) information and thus serves to assist the Chambers in their search for the truth. This assisting role in the truth-finding mission is re-iterated throughout the testimony of the witnesses.

“Judge Cotte: ...you are providing assistance to the Court so that we can establish the truth.”⁴⁸⁶

The witness, from the very beginning of the testimony is sworn in to “tell the truth, the whole truth and nothing but the truth”. This identification of testimony and truth and the respective role of the witness testifying was reproduced by the individual witnesses. Especially during cross-examination, when their credibility was openly challenged.

“I cannot say anything that is not true. I am telling only the truth.”⁴⁸⁷

“I did not come here to lie...”⁴⁸⁸

Whenever, the individual witnesses felt challenged, they re-iterated their oath to remain within the legal framework – to be heard. The scope of this truth then is defined by the parties and is summarized by Maître Douzima-Lawson, a legal representative, before questioning the victim-witnesses:

... The questions I will be putting to you will be very simple in nature: When, how, why and so on and so forth. The questions will not be for me as such, but rather will be questions that will enable you to provide answers that will enlighten the Trial Chamber as to what you suffered, as to what your experience was as you put it so well in your own words. ⁴⁸⁹

⁴⁸⁵ Testimony of V3: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 12 April 2017, ICC-01/04-02/06, p. 10.

⁴⁸⁶ Testimony of DRC-V19: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 21 February 2011, ICC-01/04-01/07, p. 5.

⁴⁸⁷ Presentation of views and concerns a/30169/15: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, p. 51.

⁴⁸⁸ Testimony of Judes Mbetingou: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 4 May 2012, ICC-01/05-01/08, p. 8.

⁴⁸⁹ Testimony of CAR-V20: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 1 May 2012, ICC-01/05-01/08, pp 9-10.

The truth required, framing the testimony is: when did the cause of your suffering happen, how did it happen, why did it happen. The suffering – or the harm suffered – as we have seen in the last Chapter is the representation of the traumatic memory at the court. The elaborations on the harm suffered are made in order to enlighten the Chamber and facilitated by the legal representatives. Trauma – harm suffered – is thereby confined to serve as evidence in the case and hence communicated/spoken/contained in a very specific legal framework that sometimes appears very disturbing.

3.3. Trauma as evidence

Trauma as evidence provided by the witnesses is spoken within the described legal framework. Since the witnesses are objectified as information providers the first disturbing manifestation of trauma as evidence is the fact that the traumatic memory is addressed through questions – but not answered. This means that, in most cases, there is no reaction to the gruesome story told. Instead of speaking – and hearing in the sense of processing, cognitively and emotionally what has been said, immediately after the answer a new question is posed – retrieving the legally necessary information from the witness:

A. “...I tried to resist. And they gave me - they hit me with the butt of the rifle in my mouth and I lost some teeth. Subsequent to that they raped me and then they told me to leave.

Q: Thank you, madam, for that information. I would like us to come back to Pluto, that is to say the moment of time when you were in fact still in Mongbwalu...”⁴⁹⁰

Sometimes these interruptions were made in order to comply with the time-schedule of the hearings. Here, the LRV, anticipating the schedule, interrupts the witness in the middle of her story of how she was raped:

“...they had rifles and every time that they go on me to rape me they still had their rifles on them.

Ms. Douzima Lawson: Your Honour, I don’t want to be reminded of the time again so I see that it’s the time now.”⁴⁹¹

⁴⁹⁰ Testimony of a/30365/15: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 11 April 2017, ICC-01/04-02/06, p. 18.

⁴⁹¹ Testimony of CAR-V20: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 1 May 2012, ICC-01/05-01/08, p. 37.

Regardless of the reason for the non-reaction, or interruption, they appear as an inadequate response to what has been said. Almost brutal. The violence of trauma as evidence becomes most evident in these moments. This exemplifies the violence to the traumatic memory, that goes far beyond the legal confines of truth, and the violence to the *victim-subject*, when having to serve as *witness-object*. The witness-objects do not only serve as information providers assisting the Chambers in their truth-finding mission, they are also used by the legal representatives to justify the cause of victim representation itself. This seems even more disturbing, since victim participation as provided for in the Rome Statute was introduced to overcome the objectification of victims for the sake of the legal process. Now, the individual victims are objectified by their own representatives in order to prove that victim participation is working. And to allow their representatives to call more victims as witnesses in the future – to serve the interests of the legal representatives.

“...Now, yesterday your answers were perfectly clear, and to my mind your answers showed the interest that the legal representatives have in ensuring that victims give testimony. We have been dealing with a number of witnesses and we have heard testimony from rape victims, but I think this is the first time we have heard testimony to the effect that a witness has been raped by 14 people.

With the new international criminal procedure in effect now, which is a bit of a hybrid, finding itself somewhere in between the English tradition in which victims do not have official standing and the French language legal tradition whereby the victim is a full-fledged part of the entire process and not just a participant. So you see we have this new system of international justice lying somewhere in the middle, and victims can also appear in Court and give testimony, although their rights may be somewhat limited. And I think in the future we will benefit from the possibility, and we do hope that legal representatives will have opportunity to call more victims before the Court.”⁴⁹²

The fact that this woman as witness, as opposed to other men and women who testified before, was raped by 14 men makes her unique within the legal framework and therefore, within these tight confines – a “relevant victim”. This seems particularly bewildering. It is not the witness herself to define her uniqueness, in fact her individuality is totally irrelevant within the legal framework of “the relevant victim” testifying. Her individuality as witness is defined by her uniqueness of being raped by 14 men which made her relevant. “The victims” are identified with their harm suffered linked to the charges, which is what distinguishes them from the other

⁴⁹² Testimony of CAR-V20: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 2 May 2012, ICC-01/05-01/08, p. 3.

parties. “The relevant victim” is identified with the “relevant harm” that must be unique, not repetitive and substantial within the scope of the charges.

3.4. Trauma as a consequence

The described confines of trauma as evidence and the representation of trauma as physical, psychological and material harm suffered, elaborated in the previous Chapter, manifests in the practice of testifying as the requirement of narrating trauma as a consequence. To be heard within the legal framework, the harm suffered has to be a consequence of the alleged crime falling into the scope of charges. Trauma, hence, has to be narrated as a causal effect of the crime. The structure of the questions asked, often already forestall this narration.

“Mr. Keta: I was putting the question to you as to the consequences or effects of your actions when you attempted to stop the children from being captured.

A: Thank you for the question. The consequences of my actions are multiple. There are several consequences to my actions, and they are serious. The first direct consequence is the blows that I received subsequent to my intervention. I received several blows and my physical state changes as a result. Another consequence is that there was material loss, whether it be my personal property or the property of the school. There are also other consequences that come to mind; notably the harm, which is still very much present in my mind. Notably the fact that my life might come to an end some day, because speaking to you now, I find it difficult to concentrate. And sometimes my lack of concentration means that I lose grasp of the situation. And I have blank moments. I have difficulties reasoning. And these are the effects, the results of the blows that I received and this is detrimental to me.”⁴⁹³

The traumatic experience of this witness is unfolded within the structure of causes and consequences until blank moments and difficulties in reasoning fit into the logic of causes and consequences.

“Could you tell us what physical harm you have suffered? What sort of side-effects or lasting effects have you had subsequent to these events?

A: Thank you, Counsel. Well, as for the physical damage or harm, after everything I went through, well, I can tell you this. You see, every women has her monthly period, but what I have seen is that each time I have my ovulation it is difficult for me to put my finger into my vagina.

The second problem that I have is with my head. I just can’t keep control of my feelings, or keep myself under control as a human being. I have

⁴⁹³ Testimony of a/0225/06: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, 12 January 2010, ICC-01/04-01/06-T-225-Red-ENG, p. 26.

psychological problems, disturbances, headaches, sometimes I even have hallucinations, and all of this is because I was involved in these massacres and all these other atrocities committed by these men. I have also problems with my lungs, because I was struck. I received blows.”⁴⁹⁴

The legal framework structures the traumatic memory according to its own requirements and the individual witnesses mostly comply with this narration. This structure of causes and consequences is the symbolic order within which the traumatic memory – the reminder of the Real – can be contained. Even the description of losing one's subjectivity within this symbolic order by being subjected to extreme violence – the impossibility of *being* within the symbolic order – can be narrated as a consequence within this very same symbolic order. The intangible can be spoken as a consequence of humiliating treatment, degrading treatment and inhuman treatment. The effect is a loss of dignity – of the essence of the human being as defined legally. The intangible itself – the Real – can only be sensed, as a strange inadequacy of the legal form, never spoken, within this framework.

“Q: How do you feel?

A: Thank you for putting this question to me. In my community I am no longer considered a human person, and by extension in the whole of the CAR I'm not considered a human being. You know, I was a human being, but I was treated like an animal, a burden, and that is why I cannot live normally. I cannot live with - calmly and live as all other girls of my age do. I cannot do that because I was treated like an animal.

You see, I'm a woman. Before these events I was a woman with dignity. I could have a family with dignity, but I lost my dignity. I was forced to change the man in my life. Really, I have no longer any dignity. That is the reason I insisted to come to testify publicly without any protective measures. Really, I suffered humiliating treatment, degrading treatment and inhuman treatment.”⁴⁹⁵

3.5. Challenging objectification

The sense that the legal framework of testifying is not doing justice to traumatic memory and that the address of Mr. and Ms. Witness is de-individualizing the victim-subject is from time to time voiced by the Judges:

„...This may seem to you as a very artificial question, whereas on the 24th of February, 2003, you were trying to save your life and the life of your child. We have certainly understood this, but if you could fill in this detail, explain this

⁴⁹⁴ Testimony of CAR-V20: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 1 May 2012, ICC-01/05-01/08, p. 4.

⁴⁹⁵ Ibid., p. 53.

detail, then we would be happy. If you can't, then Mr. Kilenda will move on to another question.”⁴⁹⁶

“...We will call you “Madam Witness” in a very impersonal fashion.”⁴⁹⁷

But most often the violence of the legal framework is revealed by the refusal of the individual victim-subjects to comply with the position of the witness-object.

“A: If we continue looking at these videos, I will stop testifying. I did not come here to give testimony on photographs.”⁴⁹⁸

Witness Judes Mbetingou on the one hand threatened to stop testifying – to quit as a witness – and on the other hand he challenges the objective of the proceedings. Rather than giving testimony on photographs – representations of what happened- he wants to speak about his perception of what happened. Thereby he reveals what distinguishes him from the Judges and the parties: They will always only speak about representations of what happened, while he experienced it. Truth at court is a representation, this is the trauma of law vis á vis the truth.

“Are we having – can you have a trial, can you conduct a trial, with photographs?”⁴⁹⁹

Judge Steiner, subsequently addressing Judes Mbetingou as Mr. Witness again, reminds him that he is a witness and as such he has to answer the questions:

“So it's important, Mr. Witness, that you answer to the questions when you are called to explain the pictures, to identify, and if you don't know who these people are, you just say, : “I don't know who these people are.” There is no problem if you say that you don't know, but if you have an answer to the question and I ask you please to be patient and to allow the Defence to continue.”⁵⁰⁰

Due to the fact, that Mr. Mbetingou had taken off his headphones, the means to hear the Judges, he could not hear the reminder. Judge Steiner had to repeat herself. He, being the one who refuses to listen, turns the roles upside down and

⁴⁹⁶ Testimony of DRC-V19: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 22 February 2011, ICC-01/04-01/07, p. 64.

⁴⁹⁷ Testimony of DRC-V19: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 23 February 2011, ICC-01/04-01/07, p. 58.

⁴⁹⁸ Testimony of Judes Mbetingou: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 8 May 2012, ICC-01/05-01/08, p. 33.

⁴⁹⁹ Testimony of Judes Mbetingou: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 8 May 2012, ICC-01/05-01/08, p. 27.

⁵⁰⁰ Ibid., p. 27.

demonstrates the dependency of the court. The court needs witnesses who serve as representations of what happened in order to establish the truth. They are in fact not only assistants – they represent the truth which is then shaped by the Court according to their requirements. When the victim-subject refuses to serve as a witness-object by, in this case, questioning the objective and purpose of the trial, s/he is referred back to the position of the witness-object. The appellation re-iterates the function and the challenging of the object (the video) voiced by Mr. Mbetingou is framed as not knowing. Not knowing equals cannot provide relevant information within the legal framework. For witness-objects there is no space for questioning, or challenging.

When the traumatic facts – the witnesses' truth – is challenged, which is mostly done by the Defence, for obvious reasons, this means that the *relevant victims'* subjectivity is challenged. Within the legal framework, this is an existential threat, because this is the only possible subject position for individuals appearing before the Court. In such existential moments, the reactions of the victim-subjects as witness-objects are most radical:

“Thank you. It was the riverbank, and at that place there was a military base and it was at that place that I was raped. I am telling you everything I suffered and I understand that the chief or leader in question and the soldiers are trying to deny the facts, but what separates us is death and what brings us together is pardon, but I refer to my Counsel and the Judges present here. Please do not forget that there is somebody, the supreme person above everybody, who sees everything that happens, and he is able to provide justice and that's what I can tell you.”⁵⁰¹

The witness invokes a higher power as a provider of justice. Thereby she relativizes the self-awarded role of the ICC to render justice to the victims. Above that, she prevents her legal death as a witness – the denial of credibility – the denial of her truth, of her relevance, by referring to the supreme person above, who sees her truth. Furthermore, she directly addresses the Judges and the Counsels and urges them to not forget this supreme person – their limitation which is the (im)possible truth – the always already blocked access to her truth, to the trauma. Because what separates the witness with the rest of the courtroom is death.

⁵⁰¹ Testimony of CAR-V20: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 2 May 2012, ICC-01/05-01/08, p. 10, similarly: p. 39.

4. Views and concerns - the relevant victim

In order to avoid the objectivization of victims as witnesses that was criticised with respect to the ad-hoc tribunals, victims can present views and concerns personally before the Chambers at the ICC. It already became clear, that this way of participation is the most restricted one. The legal representatives of victims have to “determine whether they [the victims] are best placed to undertake this exercise or whether the relevant matters would be more effectively introduced by their legal representatives.”⁵⁰² As has been shown, the only distinction that renders a victim relevant and therefore the only possible subject position from which a participating victim can be heard - is their suffering. The Chambers accordingly define that the *relevant victim* only have a legitimate interest in portraying the harm suffered which has to be linked to the charges brought against the accused.⁵⁰³ Otherwise, it is considered to be in their own interest to be legally represented.⁵⁰⁴

In the first cases, the personal presentation of views and concerns was granted after the conclusion of the testimony. In this context, the regime of giving testimony, described in the previous paragraphs was still prevailing, when the testifying victims were asked whether there was anything else they would like to tell. For this reason, distinct modalities for victims presenting their views and concerns, were developed by the Chamber in Bemba and Ntaganda that granted different victims either the right to present views and concerns or to testify. Therefore, these cases are indicative of the legally framed subject position of “the relevant victim” beside the witness-object position and its effects.

In general, the Chambers struggled to develop the modalities of the presentation of views and concerns in person. This can be explained by the ambivalent subject-position that is assigned to “the relevant victims”. On the one hand, they are only

⁵⁰² Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on victims' participation, , 18 January 2008, ICC 01/04-01/06-1119, para. 115.

⁵⁰³ Appeals Chamber, Situation in Uganda in the case of the Prosecutor v. Joseph Kony et al., Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 27 October 2008, ICC-02/04-164, para 11; Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga-Dyilo, Decision on victims' participation, , 18 January 2008, ICC 01/04-01/06-1119, paras. 102-103.

⁵⁰⁴ Ibid., para. 115.

relevant, when they comply with the requirements of a witness - best-placed to assist the Chamber in the determination of the truth, able to present views and concerns that affect the personal interests of the greatest number of participating victims, best-placed to present testimony that will not be cumulative of that which has already been presented in this case. On the other hand, they do not testify and therefore it would be prejudicial to the Defence, if they provided evidence without being forced to reveal their identity to the parties, without being under oath and without being cross-examined. The only position left given these requirements, is the representation of the harm suffered - the traumatic memory. Within the legal framework, as has been already demonstrated, this is the only distinguishing feature that turns the individual victim into “the victims” and finally into “the relevant victim”. At the same time, it is exactly this traumatic memory, that is always framed to potentially overwhelm the proceedings - threatening its integrity. As displayed in the first Chapters, in order to uphold the legal fiction, the law’s others - in this case the victims - are framed as emotional, unpredictable, subjective, partial etc. This fiction stabilizes the Court’s image to be factual, predictable, objective, impartial. Now, the *relevant victim* whose only possible position within the proceedings is shaped according to this picture of the other of law - representing the harm suffered - is at once necessary to uphold the fiction and existentially threatening to this fiction. In order to manage this tension, the narration of the harm suffered by the representatives of the traumatic memory is once again tightly controlled by criteria that are reproductive of the symbolic order upholding the fiction and leaving hardly any space for listening to traumatic memory. And it is once again the LRVs to whom the controlling function is delegated.

4.1. Mr. and Ms. Victim are guided through their harm

Once again, “the relevant victim” presenting views and concerns in person are not addressed by their name, but by their “function” within the proceedings:

“...if I may call you Madam Victim that will present is today with her views and concerns as authorised by the Chamber. Welcome, madam....”⁵⁰⁵

⁵⁰⁵ Presentation of views and concerns a/0542/08: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 25 June 2012, ICC-01/04-02/06, p. 3.

Mr. and Ms. Victim are then guided through the presentation of views and concerns by their respective legal representatives who are the facilitators and streamliners of the presentation.

“The Chamber reminds the parties that the relevant legal representative, in this case Maître Douzima Lawson, will be responsible for guiding the victim through the presentation of her views and concerns. Nevertheless, the intervention of the legal representative shall be limited to questions that facilitate the presentation of the views and concerns of the victim.”⁵⁰⁶

“The legal representative representing the victims, Mr Seprun, will be responsible for guiding the victims through the presentation of their views and concerns. The intervention of the legal representatives shall be limited to questions that facilitate and streamline the presentation of the views and concerns by the victim.”⁵⁰⁷

Since this mode of presentation resembles the framing of testimony, the representatives are compelled to ensure that the presentation of views and concerns is a narration, rather than a testimony. In contrast to testifying, the presentation of views and concerns is described to be a space for telling one’s story - for a narrative. But instead of just giving this space to the individual participants to narrate whatever is in his or her interest, it is the legal representatives who “have the victims tell their story”.

“The Chamber nevertheless encourages the legal representatives to have the victims give a narrative as much as possible.”⁵⁰⁸

“Q (legal representative): Madam, we are in open session and I will tell you to tell your story to the Judges.”⁵⁰⁹

Corresponding to “the victims” signing the application forms, “the relevant victim” is always already framed to be in need for assistance, even when it comes to telling one’s own story. The role of the legal representative and the respective conflation of speaking for and speaking on behalf of - the conflation of the modes of representation - is revealed more than once in little slips:

⁵⁰⁶ Presentation of views and concerns a/0542/08: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 25 June 2012, ICC-01/04-02/06, p. 3.

⁵⁰⁷ Presentation of views and concerns a/01635/13: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/05-01/08, p. 1.

⁵⁰⁸ Ibid., p. 1.

⁵⁰⁹ Presentation of views and concerns a/30286/15: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, p. 58.

“Q; I am the legal representative of victims in this case; that is the case before us. The President has already stated that the Chamber has authorised the legal representative of victims to express their views and concerns, and I mean has authorised the victims to express their views and concerns. You are one of those victims and, as you know, I am your representative. The President has also stated that it is my role to put questions to you which will give you an opportunity to narrate to the Court, to tell the Court what happened to you and what happened to your community. Do you hear me? In fact, I will ask you questions such as “When?”, “How?”, “Why?” and so on and so forth.”⁵¹⁰

The legal representatives, by their mode of questioning, frame what is being said and how. The questions enable the victims to narrate. When the questions, as becomes obvious from this quote - when how, why - come too close to testimony, discussions start about the nature of testimony and views and concerns. These discussions are characteristic of a difficulty to designate the meaning of views and concerns within the legal framework - and hence are characteristic of the (im)possibility to designate a space for individual victims. The difficulty becomes apparent when the parties and the judges are searching for the appropriate words defining views and concerns:

“But one general comment from my part, I would like to highlight the difference between testimonies of victims, which will be heard in April, and presentation of their views and concerns which, in my view, should be mainly focussed on, as is even in the name of this procedural measure, views and concerns, which, in my understanding, means that obviously it’s not unavoidable that during this presentation also some facts have - have to be mentioned but, in my view, the core of such presentation should be, if possible, focus especially on those views and concerns, which normally is not part of the classical testimony.

But, as I said it is understandable that we also, before listening about feelings and has affected the victim, that we also have to hear something about the sources of this harm.”⁵¹¹

Since the definition is drawn in opposition to testimony, the distinction between views and concerns reproduces the binary structure that was carved out in the first chapter. Testimony is within the realm of legal proceedings, consequently it goes to the facts of the case. Views and concerns, in contrast, relate to the emotions. Emotions are described as psychological. The practice of linking the image of the

⁵¹⁰ Presentation of views and concerns a/0542/08: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 25 June 2012, ICC-01/04-02/06, p. 5.

⁵¹¹ Presentation of views and concerns a/01635/13: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, p. 5.

victims to their harm and thereby implying a quasi natural interest in proceedings as remedy described in the previous chapter is continued. Concerning the distinction of views and concerns this takes yet another form. Since victims represent the harm suffered it must be their interest to speak about this harm - not to speak to the facts. Whereas “the victims” were described to naturally be interested in criminal proceedings dealing with their harm suffered, “the relevant victim” (in contrast to the witness- object that has by definition no interests as an information provider⁵¹²) naturally have a distinct interest - narrating their harm. On one side, there is no space for the individual victims beside the Judges and the parties, since they serve as the law’s legitimizing others. On the other side, because “the victims” interests were aligned with that of the Court (truth and justice), the distinct image of “the relevant victim” is left with the remaining definitional element - the harm. Due to the fact that the harm in criminal proceedings is addressed as facts establishing the truth that serves justice, and that the individual victims in the context of presenting views and concerns have to be distinct, their interests are defined as the opposite. Facts stand for legal proceedings, feelings/emotions stand for victims. Witnesses serve to provide facts, “the relevant victims” serve to provide feelings. In legal proceedings victims as witnesses testify, as relevant victims presenting views and concerns they narrate. As witnesses they provide information, as “relevant victims” they are told to tell their story.

The (im)possibilities of upholding the binary images reproducing the fiction of a clear distinction become obvious in the encounter with the actual relevant victims. The tension of the produced image of the emotional victim representing the harm suffered and hence the traumatic memory that always endangers to overwhelm the legal proceedings, is unveiled when the parties, Judges and participants discuss the framework of the presentation of this harm. Since it cannot be organized like a testimony and at the same time it must not undermine the integrity of the proceedings, the space for victim within the legal proceedings is negotiated within this tension.

“The Defence is very concerned by the way this is taking place... and one must realise that the expression of views and concerns are considerations of a general

⁵¹² The fact that the witness-object has no interests is illustrated in the way the parties and the judges reacted to the questions of the witnesses.

nature to take into account the views of the victims on a purely psychological basis...However, ever since this hearing started, we have not heard any views and concerns. What we are instead listening to is an account of incriminating facts.”⁵¹³

“ I believe that this question in itself calls for facts, calls for a description of the events and I don’t think that this is the purpose of hearing the views and concerns of the persons we are about to hear this morning and today.

We should limit our self, of course, saying what they went through, but we should focus on what is important for victims, and that is while do they see the harm they suffer, what do they want from the court, what do they feel about what happened, but not a detailed description. Even though it is not under oath, it is highly prejudicial.”⁵¹⁴

Views and concerns are henceforth described as considerations of a general nature having a purely psychological basis. What is described as important for victims is that they see the harm they suffer (?), what they feel about what happened - at the same time there should not be a too detailed description of what had happened. Related to these topics that are described to be important interests of victims, the form of speaking is understood to be different from the form of a testimony. More story-telling than fact finding with regard to the harm suffered.

“Ms Kneuer (Prosecution): ...but our understanding of how the victims are supposed to present their views and concerns was a different one. Perhaps our expectation was wrong, but we would had thought that the witness would be given an opportunity to present her views and concerns in context basically in one row as a story or as an essay. Also, our understanding was rather that the views and personal perspectives or opinions that the victim wants to share with the Judges, you Honours, about matters that are under consideration here, meaning the harm they suffered and what affect that has on their life and potential reparations. With regard to concerns, when we go by both terms, we had expected again information with regard to their personal interest and not so much related to evidence...”⁵¹⁵

It is remarkable that whereas “the victims” and the “relevant victims” giving testimony, as witnesses, are described to have a personal interest in the facts of the

⁵¹³ Presentation of views and concerns a/0542/08: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 25 June 2012, ICC-01/04-02/06, p. 16.

⁵¹⁴ Presentation of views and concerns a/01635/13: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, p. 32, To the same effect: Presentation of views and concerns a/30169/15: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, pp 46-47.

⁵¹⁵ Presentation of views and concerns a/0542/08: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 25 June 2012, ICC-01/04-02/06, pp 17-18.

case relating their harm suffered to the charges, “the relevant victim” presenting views and concerns are described to be interested in the harm they suffered, the effect and possible reparations. The definition of participating victims as witnesses and the related interests differ from the definition of participating victims as victims presenting views and concerns without testifying. Since, by definition, testimony/witnesses cannot be the same as the presenting views and concerns as victim, witness and victim are determined to have diverging interests according to the positions they assume within the proceedings. This reveals that the personal interest of the victims depends on the requirement and the space provided for within the proceedings, not on what the individual victims define as their personal interests.

Practically, the Chambers attempted to maintain the distinction of testimony of victim-witnesses and the presentation of views and concerns of victims by asking the legal representatives to ask less detailed questions and to focus on the harm suffered.

“Judge Steiner: ...avoid putting to the witness - to the victims, I’m sorry, so many specific questions...So, with this recommendation, The Chamber will proceed with Victim 542 and requests Maître Douzima to be less detailed in her questions and conduct the victims to focus now from now on on the harm suffered, on the consequences of the alleged conducts for her life and other kind of views and concerns that she may wish to express in relation to the facts allegedly occurred.”⁵¹⁶

In fact, it is mainly the legal representatives who frame the narratives of “the relevant victims”. They are responsible for the selection and for guiding them through their presentation. They bear the responsibility to frame the hearing so as to confine the individual victims to “the relevant victim”.

“Madam, you have been called before the ICC to provide the Judges and the other parties in the courtroom material on your personal experience and those of your friends relating to the events that took place in 2002 - late 2002, early 2003 and to talk about the harm and damage that you and members of your family suffered subsequent to those events and also about the impact that these events had on your personal life.”⁵¹⁷

⁵¹⁶ Presentation of views and concerns a/0542/08: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 25 June 2012, ICC-01/04-02/06, p. 22; also; Presentation of views and concerns a/0511/08: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 26 June 2012, ICC-01/04-02/06, p. 10.

⁵¹⁷ Presentation of views and concerns a/01635/13: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, p. 7. Similarly, Presentation of views and concerns a/30169/15: Transcripts, Situation in the Democratic

“Thank you. Thank you madam. You have done very well so far, but I would like to ask you to now focus on what happened after you met up with your children following that period of absence and then also tell the Court the impact of these events on yourself and on your daughters and on your family as well. Can you focus on that, madam?”⁵¹⁸

Clearly, in order to enable the Chamber to fully understand your views and concerns, it will be necessary to know who you are, your story, to know your story, what happened to you, and also to understand what your views and concerns are, as well as your expectations of the International Criminal Court in this matter.”⁵¹⁹

Instead of the participants’ views and concerns, the legal representatives stage what is expected to be the victims views and concerns - the harm suffered. Hence it is not the participants talking about what they want - telling their story - it is the legal representatives framing the *relevant* story. This becomes particularly obvious in this instance, where the individual participant asks the representative what he wants her to talk about:

“a/01635/13: “...Now, after my daughter was relieved following the treatment - well, do you want me to talk about my daughter, or to talk about myself?”⁵²⁰

The function of the legal representatives is to lead the victims according to the legal requirements set before. This also applies to the adequate expectations participants may have. The expectations are aligned with the defined interests in truth and justice and complemented by what is exceptionally granted to them: telling their story. Once again, it is exactly what is allegedly delivered by the court that is expected to be expected by “the relevant victims”:

“...This may seem obvious, but this is something essential for the victims, namely that justice be rendered in relation to the events that occurred on the 24th of February 2003, in Bogoro. They are yearning that justice be done and that the people responsible for these events are found guilty within full compliance of the law.

The fact that victims have an opportunity to take part in these proceedings is already an important step ahead for them, and finally, we see that the system of

Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, p. 38

⁵¹⁸ Presentation of views and concerns a/01635/13: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, p. 20.

⁵¹⁹ Presentation of views and concerns Voloube De Mbioka Francis Félicien : Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 26 June 2012, ICC-01/04-02/06, p. 13.

⁵²⁰ Presentation of views and concerns a/01635/13: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, p. 21.

international justice is reaching out to the victims, the people who were affected most directly. Up until now, some victims have been given an opportunity to come here and tell their stories in their own words before the Court....”⁵²¹

This line of questioning, that is directed at getting the „right“ answer from “the relevant victim” can also be interpreted as a desire for affirmation in the face of the gruesome stories presented. Justice in the face of the trauma seems impossible, the representatives of this traumatic memory have to re-assure the possibility of justice - the *raison d’être* of the court.

“Q: Madam, as a victim of the war in Ituri in 2002 and 2003, what do you expect from the International Criminal Court at the end of this trial of Bosco Ntaganda, that is from the point of view of justice?

A: I would want the ICC should assist me and administer justice to me.

Q: When you say you need assistance, what are you referring to?

A: Justice must be done. The criminals have to be punished.⁵²²

“Q (legal representative): As a victim of the war in Ituri in 2002 and 2003, what do you expect from the ICC subsequent to this trial of Bosco Ntaganda?

A: Thank you for your question. Someone by name of - well, it was an official of the Court who came to our area, he came to the school, they asked everyone to come and tell their story. Nicolas Kwaku. He wrote down the names of all the victims. And I believe that is the list that he presented to you were you are.

Q: What I am asking you is what do you expect from the ICC at the end of this trial of Bosco Ntaganda, that is from a point of view of justice?

A: Personally, I am happy to have been called up to give an account of what happened to me. ...”⁵²³

And when the individual victims frame their expectations differently, which was often the case, the legal representatives either summarize the expectations to be justice:

“A: I would like the Judges to deal with this dossier that the people concerned know what bad things they have done and for the Judges to give the right

⁵²¹ Procedural Matters: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 21 February 2011, ICC-01/04-01/07, p. 5.

⁵²² Presentation of views and concerns a/30286/15: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, pp 61-62.

⁵²³ Presentation of views and concerns a/30169/15: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, 1 March 2017, ICC-01/04-02/06, pp 49-50.

decision. They should look at the dossier whereby I have come here and that they listen to me in a correct fashion. This is why I am here.

Q: So to sum up what you have just said, what is important for you is that justice should be done, is that correct?

A: Yes.”⁵²⁴

Or, the expectations are getting *lost in translation* and just not replied to:

“I am suffering with this artificial leg that I am currently wearing. I have no one to help me. That is why I am begging the Judges. I beg you, please help me get a new artificial leg, or help me have a repair done to this artificial leg that I currently have.

The Interpreter: Message from the Sango booth: Could someone please ask the victims to speak more slowly?

Judge Steiner: Yes, Maître Zarambaud, just to ask you to remind the victim to speak a little bit slower?

The interpreter: Many thanks from the interpreters.

Mr. Zarambaud: Thank you, your Honour. A few moments ago I gestured to the witness - correction, the victim - and he himself - and he himself has understood what you have just said, your Honour.

Mr. Victim, I would now like to ask you whether you received any compensation for the goods that you lost, as well as for the goods of your mother...”⁵²⁵

Lost in translation in this instance literally happened. Abstractly, whenever the individual victims had very specific expectations of the court, that could not be summarized as truth and justice, or abstract reparations, they were just left without comment since they could not be translated into the abstract notions of truth and justice delivered by the court.

With regard to views and concerns, as the new form of victim participation that is also legitimized by the narrative of healing through participation and the therapeutic effect of telling one’s story, the re-assuring questions are put slightly differently:

⁵²⁴ Testimony of DRC-V19: Transcripts, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 22 February 2011, ICC-01/04-01/07, p. 38.

⁵²⁵ Presentation of views and concerns Voloube De Mbioka Francis Félicien : Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 26 June 2012, ICC-01/04-02/06, p. 24.

“Q: Madam Victim, beside your physical problems, the Chamber would like to know how are you feeling after having appeared before the Chamber to tell your story?

A: Madam President, thank you for that question. I do not feel at ease each time I have to give an account of the acts that I was subjected to, but for the time being, I feel relieved.

Q: Madam Victim, why did you decide to come and tell your story before the Court?

A: I have told you what happened to me. If I did not do that, I would not feel comfortable. It is for that reason that I decided to express all my concerns and talk about everything that happened to me to the Court.”⁵²⁶

Answers to the same question, that go beyond the relieving effect of telling one’s story and that raised expectations which were left unanswered:

“A: I do feel a sense of satisfaction, because I have been able to come before the International Criminal Court and I do believe that my expectations will be met and the Prosecutor has all the evidence so that decisions can be made about everything that we were subjected to.”⁵²⁷

“A: I feel a sense of joy, After expressing my views and concerns, I am feeling quite satisfied. I am coming towards the end of my testimony, and I am waiting for the Court to do something to help me get another artificial limb. I am waiting for good-hearted people to help me and find me a house that I can live in. So, there you have it. This is everything that I am expecting from the Court.”⁵²⁸

5. Conclusion

Analyzing the practice of testifying and presenting views and concerns in person the practice of representation, collectivization and externalization are continued and manifest in the criteria for speaking and being heard as a witness-object and as a “relevant victim” subject. Firstly, the legal boundaries have to be reiterated in the face of the representation of “the victim” as described in the first chapter, since it is at

⁵²⁶ Presentation of views and concerns a/0542/08: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 25 June 2012, ICC-01/04-02/06, p. 29.

⁵²⁷ Presentation of views and concerns a/0394/08: Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 26 June 2012, ICC-01/04-02/06, p. 8.

⁵²⁸ Presentation of views and concerns Voloube De Mbioka Francis Félicien : Transcripts, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, 26 June 2012, ICC-01/04-02/06, p. 27.

once securing the identity of the international criminal proceedings as rational, neutral and impartial etc., on the other hand it is exactly this image of the victim that is always already threatening to overwhelm the proceedings. Against this backdrop, the Chambers re-iterated the legality of the proceedings and re-emphasised that they have to strictly control who might speak within these confines, because otherwise the integrity of the court is endangered. The control applied results in the development of criteria to be fulfilled to become a “relevant victim”, either to give testimony, or to present views and concerns in person before the Court. The subject position of “the relevant victim” henceforth frames the actual encounter between the individual participants and the Court. “The relevant victim” is required to be unique and representative at the same time. While “the relevant victim” should not be repetitive, the harm suffered must be linked to the crimes charged by the Prosecution. The defined unique characteristics of “the relevant victim” is the harm suffered. This image frames the speaking and hearing once “the relevant victims” come to the Hague and testify, or present views and concerns.

“The relevant victim” as witness-object is confined to being an information provider, assisting the Chamber in their determination of the truth. As such the testifying individual participants are addressed from the very beginning. Beside the facts considered relevant by the parties and the Chamber, information are either ignored, not understood, or rejected as irrelevant. “The relevant victim” serves as evidence and has no interests him/herself. Their harm – the traumatic memory – is turned into evidence serving the court. Instances where the witness explains what happened without any reaction but another question, are the most disturbing moments, where the inadequacy, the lack of the legal framework vis á vis trauma becomes very obvious. Furthermore, trauma has to be described as a causal (direct⁵²⁹) consequence of the crime under consideration. Thereby, the legal framework of testifying on the one hand provides a means to speak about the unspeakable trauma. Thus, even hallucinations and blank moments can be narrated as a consequence of the crime instead of a rupture of the symbolic order. On the other hand, the complex and intangible structure of traumatic memory that bars symbolization is sanitized. Whenever the victim-subject challenged the witness-object position their position as

⁵²⁹ See the definition of relevant harm in the previous Chapter 6.

information providers without interests is re-iterated by the Judges. Challenging questions is described as not knowing within the framework of testifying. Not knowing means, not able to provide the relevant information. The violence of this framework, its inadequacy in the face of trauma, is revealed in the slips, outbursts, bewilderment and the subsequent attempts to re-integrate the testimony into the symbolic order of the Court.

Presenting views and concerns personally is even more challenging to the legal framework at the ICC. Whereas the modalities of testifying are clear, the modalities for this mode of participation were non-existent and therefore had to be developed by the Chambers. The problematic of the image of “the victims” as both legitimizing and threatening to the identity of the court became more urgent in this context, because “the relevant victim” was defined by its harm – trauma - and within the realm of presenting views and concerns it could not be confined to the position of a witness-object and thereby controlled. Whereas “the victims” are interested in criminal proceedings dealing with their harm but never appeared within the proceedings, since they are legally represented and witnesses as information provider have no interests, “the relevant victims” presenting views and concerns have an interest in presenting the harm suffered. The position of “the relevant victims” is then developed in opposition to the position of a witness. The witness speaks about facts, gives a testimony in detail and provides relevant information to determine the truth. “The relevant victims” presenting views and concerns speak about emotions, narrate in a more general fashion – tell their story. Once again, this is, on the one hand, exactly the position that is described as endangering the integrity of criminal proceedings, on the other hand, the description as the opposite is also already a confining framework ensuring a certain structure of speaking and hearing that forecloses irritations. Whenever Mr. and Ms. Victim exceeded this framework, they could be disciplined by reminding them of their position, their interests. This task is to be fulfilled by their legal representatives. Serving as facilitators, guides and streamliners who have “the relevant victims” tell their story, the legal representatives bear the responsibility to stage the relevant story and the expected expectations.

When the court comes closest to an encounter with actual victims, the overwhelming experience of radical relationality and the related revelation that the

self-image of the factual, neutral and impartial court relies on its opposite – the victims – needs to be forestalled. By defining the relevant victims and framing their testimony and views and concerns accordingly, the symbolic order stabilizing this image is reproduced and the (im)possibilities concealed. Those who cannot foreclose the encounter by relying on the legal structuring of criminal proceedings are the legal representatives, who are the legal guides through the harm of “the relevant victims”. They are responsible to represent, translate and select “the relevant victims” for the court.

Chapter 8: Relations

1. Finding the (right) *relevant victim*

„This is an area in which the legal representatives have a crucial role to play: it is of undoubted importance that the participating victims receive careful and comprehensive advice as to the most appropriate form of participation by them in this trial.“⁵³⁰

It is the legal representatives' responsibility to select among *the victims* those who are able to assume the position of “the relevant victim”. Unlike the Chamber, however, the legal representatives are the representatives of the actual individual participating victims. The perception of the exclusionary violence inherent in the practices of representation and subject formation constituting victim participation at the ICC is decisively influenced by the proximity or distance to the individual victims.⁵³¹ Proximity and distance are not solely understood geographically, although this dimension also plays a role. The actual participants are distanced through the practices of representation, collectivisation and externalization – or the court thereby distances itself from the victims. This also influences the space for perceiving irritations. As shown in the previous chapters, the closer the actual participants came to the court – the more control was exerted to foreclose the unexpected encounter and to thereby protect the *integrity* and *stability* of the court.

Whereas these distancing practices allow practitioners at The Hague to rationalize their own work according to legal principles without being disturbed by the complexity and impossibilities of representation given the heterogeneity, diversity and individuality of the actual participants, the tension is sometimes unbearable for those who are in direct contact with victims. It is at this point within the practice of victim participation, where the perception of radical relationality is most likely and the urgency becomes obvious. “[p]art of the success was due to a fact that the lawyer

⁵³⁰ Trial Chamber I, Situation in the Democratic republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 26 June 2009, ICC-01/04-01/06-2032-Anx, para 27.

⁵³¹ In institutional (organizational) sociology this is referred to as periphery and centre, whereas the centre is rationalizing the work of the periphery which then leads to tensions because of the exclusions inherent in reducing complexity. See: Klatetzki (1993).

was able to identify, for instance, the right victims to appear in Court, now the right victims is probably to write into brackets...”⁵³²

This Chapter addresses the effect of the subject position of “the relevant victim” within the search for the *(right) victim*. The formulation of the right victim was relativised by the LRV immediately after it had been said. I was asked to write right in brackets. I will use this (right) throughout this chapter because it is reflective of a sensibility I found among representatives who directly work with participants and therefore are more aware of the heterogeneity of victims. They have to reconcile heterogeneity with homogeneity; complexity with simplicity; individuality with collectivity. For this reason, they bear the (im)possibilities of representation. This manifests differently within the practice of representation. Firstly, the construction of the *relevant victim* frames the search for “the (right) victim”. The narrow criteria defining the *relevant victim* influenced the representational practices and could be traced as patterns that affected the way in which victims were perceived. Thereby, the *relevant victim* also shapes the way in which speaking and hearing between the LRV and their clients is framed. It determined to a certain extent, how stories are told and perceived, the content of these stories, and the selection of those who tell the stories. The first part will therefore outline the preconditions and context of speaking and hearing within the situation countries (1.2.). Here, language and translation become a crucial issue (1.1.) and, within this chain of translation, the hierarchy of representation within the situation countries will be addressed (1.3.).⁵³³

In the second part, since the possibility of perceiving radical relationality is higher in the direct encounter with individual victims, the effects of these encounters will be described (2.). Although these are very personal experiences and can not easily be generalized, there are patterns within the interviews that correspond with my own experiences. In this chapter these patterns are summarized as the urgency of relating (2.1.). These encounters are representative of the relationality of the ICC with its others – the victims and its effects within the institution itself. Nevertheless, the tensions these encounters produce are acted out by the legal representatives between

⁵³² Interview with LRV, 16/6/2014.

⁵³³ Personal experiences reflect only the situation in Kenya, whereas the information retrieved from interviews with legal representatives are reflective of almost all situation countries (Côte d’Ivoire, Democratic Republic of Congo, Central African Republic, Uganda).

narcissistic samaritanism and despair (2.2.). On the one hand, legal representatives resort to reproducing the mutually constituting images of the benevolent legal court and the dependent victim. On the other hand, they fundamentally doubt the meaning of victim participation and its legitimizing narratives. This reflects the justice gap always already inherent in the representation.

1.1. Relations are a matter of language

Since the responsibility to find “the relevant victim” is delegated to the legal representatives, they developed their own modification of “the relevant victim”, calling it “(right) victim”:

“...part of the success was due to a fact that the lawyer was able to identify, for instance, the right victims to appear in Court, now the right victims is probably to write into brackets, but... people who could explain. And another thing, I think, what was appreciated by the judges and this is tangible, we have seen it, was the fact that victims could contribute with a plus.”⁵³⁴

It is obvious that the requirements developed by the Chambers defining “the relevant victim” influence the criteria of finding “the (right) victim”.

The first implicit criteria for “the relevant victim” that is also important for “the (right) victim” was established by the Chamber in emphasising the distinct legal language spoken at the Court and the possible destabilization by legally untrained victims who come to the Court and speak “about very difficult things that have happened to them..”⁵³⁵ Within the search for the right victim, this requirement of speaking the right language is reflected in the fact that representatives repeatedly emphasised that the legal language differs from the language of the victims.⁵³⁶ This is also reflected in the requirement of *being able to explain*.⁵³⁷ Accordingly, the requirement constituting “the (right) victim” is, that they are able to adapt to the language spoken at the Hague which enables them to *explain the very difficult things that have happened to them* in an *adequate language*. In theoretical terms one could say that legal representatives are looking for individual victims who are able to narrate trauma

⁵³⁴ Interview with LRV, 16/6/2014.

⁵³⁵ Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 26 June 2009, ICC-01/04-01/06-2032-Anx, para 23.

⁵³⁶ Expressly mentioning different languages and the need for translation: Interview with ICC staff, 5/3/2014; Interview with NGO staff, field notes, 4/2/2014.

⁵³⁷ Interview with ICC staff, 16/6/ 2014.

within the given symbolic order – articulate the harm suffered as a result of the crime tried within the legal framework.

The second requirement mentioned is to “contribute with a plus”. This reflects the requirement of being unique and not repetitive. Furthermore, it is illustrative of the defining characteristic attributed to victims, which renders their truths unique – their cultural background.

Within the search for “the (right) victim” who is *able to explain* and to *contribute with a plus*, translation from one language into another,⁵³⁸ from one culture to another plays a crucial role. Language is essential for explaining and hence for understanding, it is the basis of relations:

“Next time I'm going actually to specify that or because sometimes this could be also misunderstanding of course, because we are not speaking the same language in the Courtroom than when we meet with them.”⁵³⁹

Language is fundamental for speaking and hearing and therefore translation is the facilitator of relations. In the context of legal representation, the language barriers imply at least two dimensions, the respective native languages and the legal language. Dimensions of culture, are inherently linked to language – accordingly one speaks of a legal culture to which the specialized legal language belongs. Above that, understanding the culture of the situation countries and the specific cultural background of the victims is described as necessary within the practice of victim participation. For once, to understand participating victims, but also because this is the plus to add by the victims – their contribution to the truth which is supposed to help the court to understand the context of the respective cases. In conclusion, language and its cultural dimensions have a decisive impact on hearing and speaking and hence frame the search for “the (right) victim” who speaks the “right language”.

Within the practice of representation there are hierarchies of representation, reflecting who speaks the “right language” and who does not. Curiously, the “right language” is the language that is hearable at the court, not the other language spoken

⁵³⁸ Translate: To bear, convey, or remove from one person, place or condition to another; and: To turn from one language into another; “to change into another language retaining the sense” Johnson; also, to express in other words. Oxford English Dictionary, <http://www.oed.com/view/Entry/204841?rskey=4BHq0F&result=2&print>, last accessed 27/11/2014.

⁵³⁹ Interview ICC staff, 19/6/2014.

by the participating victims. Their language has to be translated into the language in the courtroom. Again, the lack of understanding participants is described as their lack of speaking and understanding the legal language. This is reflective of a hierarchy of representation with those who speak the legal language, the LRVs at the top. But in order to understand the participating victims, translators are needed. These translators are the field assistants speaking one of the local languages and preferably have a legal background.⁵⁴⁰ Those assistants are representatives of a national elite, who could afford to go abroad for their studies to learn the “right language”. Since, “[S]ometimes there is pure incomprehension! It helps when they have been abroad at some point.”⁵⁴¹ Abroad refers to European or American universities. The same applies for intermediaries from local NGOs who legitimize themselves by claiming that they speak the victims’ s language and thereby distinguish themselves from international organizations.⁵⁴² While at the same time they have to proof that they are comprehensible in both languages.

In fact, although the hierarchy and self-image are constructed otherwise, it is the ICC that is always already in need of assistance for reaching and understanding the participating victims. This dependency is obscured by constructing the translators as native informants and describing the victim as always already in need of assistance as will be elaborated on below.

1.2. Who relates to whom?

“The development of partnerships is important for reaching the broader local population through culturally appropriate intermediaries, particularly where ICC staff is unable to contact the general public due to lack of resources, logistical or other constraints or security concerns. Developing partnerships will also decentralize the dissemination of information and, by supporting the creation of local initiatives and/or networks, increase the awareness of the general population on Court-related issues.”⁵⁴³

In order to understand the chain of translation from the participating victims through the intermediaries, field assistants and legal representatives to the Chambers at the Hague, the figure of the field assistant and intermediary can be conceptualized

⁵⁴⁰ Interview with LRV, 20/6/ 2014.

⁵⁴¹ Field notes, 22/1/2014.

⁵⁴² Interview with NGO staff, field notes, 4 February 2014.

⁵⁴³ Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 29 September 2006, para. 66.

as a ‘native informant’. This understanding reveals the hierarchical structure inherent in the chain of translating victims’ views and concerns from the situation countries to the Hague.

The figure of the ‘native informant’ is conceptualized in post-colonial theory, tracing the continuities of colonial exploitation of knowledge and the respective politics of oppression and governance. Colonial officers and researchers relied on people from the communities for access, information and translation.⁵⁴⁴ The native informant is a person whose experiences allow him/her to speak as someone who “was there and knows” (Grewal 2016, p. 34). They are persons relied on to render legible and transparent “the otherwise opaque culture of the non west.”⁵⁴⁵ Accordingly, they are referred to as culturally appropriate intermediaries in the Strategic Plan for Outreach of the ICC.⁵⁴⁶

This description can be applied to the description of the tasks and personality of the field assistant by the Chambers and the Registry. And, to a certain extent, this also applies to the intermediaries working at local NGOs, who belong to an urban elite who organize access to the victims’ communities and allegedly speak both languages.⁵⁴⁷ It is important to note that the figure of the ‘native informant’ is, from the perspective of the West, described as a two-way translator and an information provider - not as a subject with an own agenda. Of course, this description fails to acknowledge the potentially subversive role of the native informant, that became obvious in the Lubanga case.⁵⁴⁸ In any way, the native informants are on the one hand complicit in upholding the asymmetrical relationship, on the other hand they

⁵⁴⁴ The native informant as cultural broker

⁵⁴⁵ Grewal (2016, p. 34). Not going further into the philosophical figure of the native informant developed by Spivak in A critique of postcolonial reason.

⁵⁴⁶ Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 29 September 2006, para. 66.

⁵⁴⁷ Language, in this context is not only literally the language spoken, but refers to cultural background, social background etc. This of course is an illusion, because many of the victims participating do not belong to the national elite, but to marginalized groups. In the context of my research, Kituo and my two colleagues and the translator were my ‘native informants’. I depended a lot on them and their interpretation of the situations and interviews.

⁵⁴⁸ In Lubanga, the credibility of intermediaries was often challenged and a more transparent policy was the lesson learnt. Within the judgement there are detailed and careful findings on witnesses and “intermediaries” who facilitated contact with potential witnesses who may have manipulated them; Trial Chamber I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, paras. 63-220.

bear a central role since they control information. They are the in-between the ICC - LRV - and victim communities.

“An intermediary is someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other.”⁵⁴⁹

In the dichotomy between meaningful and effective, the field assistants as native informants, are responsible to ensure the meaning of victim participation by enhancing the flow of communication between “the victims” and the court. They speak *their language*, know *their culture*, and can understand *their realities*. They are based in the field, providing the Lead Counsel with “first-hand experience of the local context and a capacity to rapidly obtain the trust of victims in the case.”⁵⁵⁰ Whereas the Lead Counsel has experience with legal proceedings, the field assistant provides the counsel with complementary experience.⁵⁵¹ Thereby, the understanding of the local context is combined with legal expertise of proceedings before the Court.⁵⁵²

Accordingly, the role of the field assistants can be described as a translator of the local to the global. The local is equated with culture. The specifics of the local culture are addressed as something that needs to be translated in order to be understood. The own legal culture is thereby naturalized as something universal. The periphery needs to be translated to the centre by native informants. As already mentioned, the own incapacity of speaking their language is not perceived to be a lack, whereas *their* incapacity to speak *our* language is the problem to be solved and the gap to bridge through the field assistant as native informant. The OPCV prefers field assistants who have a legal background, who speak both languages and hence are familiar with both cultures.⁵⁵³ “We normally tend to recruit someone with a legal background,

⁵⁴⁹ Guidelines Governing the Relations between the Court and Intermediaries, March 2014, <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf>, last accessed on 29/5/2018.

⁵⁵⁰ Pre-Trial Chamber I, Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Laurent Gbagbo, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, para. 39.

⁵⁵¹ Ibid., paras 43-45.

⁵⁵² Ibid., para 45.

⁵⁵³ Interview with LRV, 16/6/2014; Similarly, a colleague of mine said: “It is better when they studies abroad.” Field notes, 22/1/2014.

because of cause this facilitates a lot the communication and the way in which you collect.”⁵⁵⁴

Beyond translating victims’ views and concerns into the legal representatives’ language, who subsequently translate the views and concerns into legal submissions, the field assistants, as described previously, are responsible to prepare and organize group, and individual meetings. They receive information from the legal representatives concerning the topics of the meetings and then organize transportation, location, distribute questionnaires etc. They organize information and they organize “the victims” to ensure a smooth execution of the field trips of their Lead Counsels, who in turn organize the information and impressions they *collected*. NGOs rely on intermediaries or rather spokespersons⁵⁵⁵ to establish and maintain contact with victim communities. Many of these persons are themselves victims and claim to represent, speak for and on behalf of other victims.⁵⁵⁶ In any case, they could convince the NGOs to be representative of a majority of victims, which is crucial for becoming a “(right) victim”⁵⁵⁷. The need for spokespersons demonstrates that in fact the native informants themselves depend on translation, since they are not necessarily speaking the language of the participating victims. Consequently, the chain of translation from the individual victims to the Hague is very long and involves multiple steps and persons. Ultimately, although there is a clear hierarchical structure, the preconditions for speaking and being heard remain opaque.

The field assistant/native informant is complementary to the Lead Counsel and provides him/her with the required assistance, but the Lead Counsel is the lawyer from the OPCV, or an external counsel selected by the Registry who has the legal expertise. The Lead Counsel is described as legally effective, the field assistant as culturally meaningful and the latter serves the former. The reconciliation of

⁵⁵⁴ Interview with LRV, 16/6/2014, similarly, Interview with LRV 5/3/2014: “... dass es so viele Opfer sind, dass man gar nicht jeden einzeln ansprechen kann, dass man eben versucht zu rotieren und samples aus verschiedenen Gruppen, die nach Wohnort eingeteilt werden, dass man immer wieder versucht verschiedene Leute anzusprechen und sozusagen rotiert.“.

⁵⁵⁵ Intermediaries in the literal sense only channel views, according to my findings, intermediaries used rather understood themselves as persons who represent the interests of a group and thus they already translated it.

⁵⁵⁶ Interviews with victim-representatives, field notes 23, 24/2/2014; In a meeting between Kito and a representative from the ICC, they agreed that they were working with the same intermediaries.

⁵⁵⁷ Field notes, 22/3/2014.

meaningful and effective is in this context discussed as the translation between the binaries of local - global; culture - nature; periphery - centre, special and universal.

The binary between abstract universal law and the specifically located site of (non Western) culture is thereby reproduced and the native informant serves to bridge the binary by translating the local to the global, the culture to the nature, the periphery to the centre and the special to the universal.

1.3. Questioning the hierarchy

Already at the Hague, the hierarchy inherent in the organization of representation was questioned and thereby revealed by Judge Ozaki, in her dissenting opinion on the organization of legal representation:

“There is a risk that the voices of participating victims, and the reality of their situation on the ground, can become filtered out in the relay from a village in Ituri to the courtroom in The Hague. The importance therefore to a Chamber of receiving the victims' perspective on the ground as directly as possible through the appointed LRVs must be stressed.”⁵⁵⁸

She questioned whether diversity is lost when being legally filtered by representatives located at The Hague. Thereby she addresses the practice of representation as a filtering of diversity into homogeneity. Filtering is always a selection process and exclusions are inherent. She emphasizes that something is getting lost in representation. Instead of describing the filtering as collecting the relevant information, she emphasizes the loss. The description of native informants as facilitators of information collection from victims, used by the legal representatives, draws an image of the victims as holders of information that are accessible through the informants. It suggests that whenever certain kind of information is needed, it can be collected and that this is a neutral process. The description obscures that the kind of information retrieved depends on the kind of information asked, the language used, the context of speaking and hearing and that the whole process is hierarchically structured. It insinuates that any selection is deliberately controlled by the legal representatives who have access to all possible

⁵⁵⁸ Trial Chamber VI, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, Partly Dissenting of Opinion Judge Ozaki, 16 June 2015, ICC-01/04-02/06-650-Anx, para 14.

information. When directly speaking with participating victims, this assumption turns out to be an illusion.

Furthermore, the dissent addresses the role of field assistants and their proximity to the participating victims. Implicitly, Judge Ozaki questions and thereby reveals the described hierarchy of representation between those who are working meaningfully with the victims *there* and those who are efficiently representing victims legally *here*. She values *proximity* over *distance* as a benefit to the proceedings as a whole:

“In this context, I do not consider that contact with members of the LRVs' teams in the field can adequately substitute for the victims having a proximate relationship of the nature described above with the LRVs themselves. As noted by a significant number of victims in the consultation process, proximity requires personal engagement, and this should be facilitated to the maximum extent possible within the limits necessarily imposed by common legal representation. The work of the field teams should supplement the counsel-client relationship, not replace it. As elaborated further below, ensuring that lead counsel - who will be framing the submissions and, when appropriate, appearing before the Chamber - is the person with whom the victims have a proximate relationship is to the benefit of the proceedings as a whole.”⁵⁵⁹

Judge Ozaki, in her dissent, confronts the practice of representation with its losses, namely proximity and diversity. She furthermore warns that the current practice is actually silencing through filtering and problematizes the streamlining processes.

Above that, she indicates that the OPCV might not be perceived as independent because it is located at The Hague. In this context she raises the problematic that the OPCV being located at the ICC, as opposed to external legal representatives could appear less independent.⁵⁶⁰ “By way of example, victims' interests may not always be in conformity with those of the Court as an institution, and LRVs who are structurally aligned with the Court may be perceived as having greater conflict in that regard.”⁵⁶¹ The later warning reveals that far from being neutral, the Court, as a location, also stands for a dependent view. Rather than assuming the own neutrality and independence, the change of perspective allows to address own embeddedness. Above that, Judge Ozaki exposes the hierarchy within the representational practice

⁵⁵⁹ Trial Chamber VI, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Bosco Ntaganda, Partly Dissenting of Opinion Judge Ozaki, 16 June 2015, ICC-01/04-02/06-650-Anx., para 9.

⁵⁶⁰ Ibid., para 12.

⁵⁶¹ Ibid., para 13.

and problematizes the proximity/distance complex. She suggests that it is important to have the LRV close to the participating victims and that it does not suffice to have native informants, but that the native informants should become the Lead Counsels. Thereby, the emphasis is shifted from the effective to the meaningful.

This dissent shows that already at the Hague, the inherently exclusionary practice produces opposition and that it is often through this opposition that the inherent hierarchical structure of the practice is revealed. The ghosts of the decisions taken at the Hague appear between the lines of dissent.

Still, since the binary of *here* and *there* described previously is not generally questioned, and the mutual dependency of the constructions not acknowledged, the dissent only shifts the emphasis without touching upon the structure itself.

In this vein, and to comply with this demand raised by Judge Ozaki, legal representatives saw their role in transmitting *the reality on the ground* to the courtroom at The Hague:

“to use their words in the courtroom to give some more reality to the judges and to the people in the courtroom of what happened and then give you the cultural context, educational background and the feeling of the people....”⁵⁶²

Given the binary constructions of *here* and *there* this is an impossible endeavour and the consequences of this impossibility are mostly perceived by the legal representatives and the field assistants, and intermediaries who bear the responsibility to translate.

“We are fed up, we are the ones who speak the language – who are supposed to understand their (victims A/N) needs, they (ICC staff A/N) are coming to us.”⁵⁶³

For now, it is important to bear in mind, that the practice of participation involves many native informants who facilitate relations between the court and the individual victims and the legal representatives and their clients and filter voices. They set the context of speaking and they are far from neutral. Outbursts, like *we are fed up* are quite common among native informants. But frustration is not the only expression of the impossibilities inherent in the current practice of victim participation.

⁵⁶² Interview LRV, 5/3/2014.

⁵⁶³ Interview with NGO staff after a meeting with ICC staff, field notes, 4/2/2014.

2. Feeling the urgency of proximity – everybody should go *there*

”I think that basically everybody involved in a trial should go and see what, what the life of the people is. Because, I do not think that it is obvious that the arc is giving you an idea of what the real situation of people is. It might solve a lot of issues. Because, judges or assistants of judges should definitively go and see and realize that we are definitely not in The Hague when we are over there. Yeah, I think it should be mandatory. But it should be mandatory for everybody working for the court, even in finance... meaning the broad, broad picture. You are still working for the court. So, you basically should have an interest in what is going on. It is easier for me because I am in the middle of it, but I really think that it might solve a lot of issues.”⁵⁶⁴

“...meet these people, because the rest of the time you are sitting either in court or behind your computer. And then I think that is why everybody should go, is to be reminded of why you are doing that. ...to be reminded quite often that, it is not just legal arguments but that it is about real people. I think this is essential...”⁵⁶⁵

What is getting lost in the process of institutionalization of victim participation and representation, the direct encounter with participating victims, is described by most of the legal representatives as something that is crucial to understanding *what the ICC is all about*.⁵⁶⁶ The encounter with the *reality over there* shows *how it is* and is important for understanding what the *here* is all about. This is when feelings enter the legal stage, it is described as building a relationship to those who should be the main actors:

“This is something you need to see - you need to be there to understand, if not you get dry...” “What comes to my mind..., comes to my mind, ...faces, the people I met, many different types of emotions of...expressed by people and that I felt, although it is very important to have a proper distance when you do your work for many other reasons, but of course, you do not stop feeling things.”⁵⁶⁷

“...maybe, for me the most important is that, yeah, it is people related. You have to listen to them. Which tends not to be the case for everybody.... And I think although participation itself is not granting you a lot of prerogative in trial. But I think they are the main actors.”⁵⁶⁸

Within the theoretical framework this is indicative of the encounter with the constituting others of the court, an encounter with *them there*. This encounter is

⁵⁶⁴ Interview with LRV I, 19/6/2014.

⁵⁶⁵ Interview with LRV I, 19/6/2014.

⁵⁶⁶ Interview with LRVs 5/3/2014; 18/3/2014; 16/6/2014; LRV I and II, 19/6/2014; Interview with NGO staff 20/3/2014.

⁵⁶⁷ Interview with LRV II, 19/6/2014.

⁵⁶⁸ Interview with LRV I, 19/6/2014.

sensed and can be described as feelings. And although feelings are constructed as destabilizing within the legal process, when describing the importance of victim participation, the legal representatives emphasise that it is feelings that enables understanding and relations.

Like indicated previously, the wording and emphasis changed the closer, or the more removed the people I interviewed were from the actual participants they were representing. While those in Kenya emphasised the challenges of victim participation, the representatives located at the Hague adhered more to the legal language, covering difficulties under the smoothing assertion of effective and still meaningful.⁵⁶⁹ The latter were often more reluctant to talk about difficulties related to representing victims within the proceedings at The Hague. They were, for once more involved in the everyday institutional practice at the ICC, which comprises talking the official legal language and communicating, on a daily basis, with different organs of the court. Problems described then concerned either, legal issues, like participation in the investigation phase in order to broaden the scope of the cases.⁵⁷⁰ Or legal and institutional struggles to create space for the acceptance of the views of victims represented by them at the court.⁵⁷¹ With respect to meeting the participating victims, one of the main issues addressed was requesting the required financial resources for field trips.⁵⁷² This stands in contrast to the problems described by those at Nairobi, whose critique was more radical and whose reaction was stronger and more emotional.⁵⁷³ An issue that appeared throughout the interviews was the fear that victim participation, a project they all felt was absolutely necessary, could be an empty ritual, could in fact be meaningless to those who should benefit - might indeed be impossible given the current practice. The ghost of the symbolic was ubiquitous.

In the words of a colleague from Nairobi:

“We are fed up ... the process is disconnected from victims. Say it is just for justice, do not hide behind victims!”⁵⁷⁴

And in the words of a representative at the Hague:

⁵⁶⁹ See interviews with LRVs 16/6/2014; 20/6/2014; LRV I and II 25/06/2014.

⁵⁷⁰ Interview with LRV I 25/06/2014.

⁵⁷¹ Interviews with LRVs LRV I and II, 19/6/2014; 27/6/2014.

⁵⁷² Interviews with LRVs LRV I and II, 19/6/2014.

⁵⁷³ See Interview with LRVs 5/3/2014; 18/3/2014, Interview with NGO staff, 20/6/2014.

⁵⁷⁴ NGO staff, field notes 9/1/2014.

“Somebody asked me to stand up in the courtroom alone and to be able to represent stories, thousands of stories, of people I’ve never met, living places I have never seen. For me this is not working.”⁵⁷⁵

“..because it is important in order to represent them to meet with them and to know what they expect from you. Ahm, otherwise I guess they are just on paper and it is not really efficient...”⁵⁷⁶

Interestingly, from the last quote it becomes clear that the sense of meaningful and effective is different for the legal representative than it is in the legal submissions by the Registry and the decisions of the Chamber. Framed in the description of meaningful and effective developed by the Chambers, it would have probably read: “Otherwise, victim participation would be symbolic (on paper) as opposed to meaningful for the victims.” Here what is meaningful for the Court becomes efficient for the victims, when the perspective changes.

The meaningfulness of participation as it is practiced at the ICC is also an issue that is questioned by the legal representatives:

“So in any case at some point you lose track of the real people. Because you have to discuss things. I mean, even me, representing victims, I have to write submissions that are very legal, which is very good, I mean if I do not do it, then it is not in the best interest of my clients and that is why they have a lawyer... but they have immediate needs, and it is very long. For them it is even longer...”⁵⁷⁷

“It is also because they have to be remembered that what they do is for these people. Otherwise what is the real meaning of justice? Just to...discuss issues that basically nobody cares about except for people working here, or because things should not happen again?”⁵⁷⁸

When the *here* and *there* are disconnected, the meaning is lost. The problem is, that all descriptions still reproduce the binary logic of *here* and *there*, of facts and emotions etc.. And it is the other over *there* that remind us over *here* wherefore we work, namely for *them*. It does not reverse the logic of the ICC as the provider of justice for victims.

This perceived discrepancy caused many legal representatives to generally doubt the possibility of meaningful truth and justice for victims participating in the

⁵⁷⁵ Interview with LRV II, 19/6/2014

⁵⁷⁶ Interview with LRV I, 19/6/2014.

⁵⁷⁷ Interview with LRV I, 19/6/2014.

⁵⁷⁸ Interview with LRV I, 19/6/2014.

proceedings. Subsequently, the own work is called into question which obviously is a threat to the self-image as the providers of truth and justice and the facilitators of healing.

3. Between despair and narcissistic samaritanism

The legal representatives oscillate between despair resulting from impuissance vis á vis the immediate needs of the own clients and the resulting doubts about the importance of the own work and the re-iteration of the good they do. The conviction of doing good and always being in the right side serving victims, can be compared to what Kapoor describes as narcissistic samaritanism.⁵⁷⁹ He describes narcissistic samaritanism as: "...being promoted as benevolent, while professing neutrality in order to 'empower' the Other." (Kapoor 2008, p. 228)

Even when representatives addressed the disparity perceived between the *here* and *there*, the impossibility of bridging the gap, and the fiction of justice for victims, which caused them to challenge the whole idea of victim participation:

"...sometimes I thought it might be better to leave out victims. Leave them out of the criminal process, then nobody can exploit victims' interests, because this is what everybody does!"⁵⁸⁰

"Because what they need is definitely not to listen to things, this is not going to solve their immediate problems. And it might be more difficult than to have discussions with them. ... Ah, but I think for them they have immediate problems to solve and yeah, I understand that listening to their rights layer might not be the best."⁵⁸¹

They almost immediately resort to a modified notion of justice as empowerment that could still be delivered to the victims by them and thereby legitimize their work:

"Overall, I think it is the right idea to involve victims in the proceedings, I mean in international criminal proceedings as well ... to include victims' interests. I think that for the victims, at least those few who are being reached...they somehow benefitted. Not justice, but recognition and being

⁵⁷⁹ Again, I want to emphasize that this description also applies to myself. I do not want to exclude myself by pointing at others. The feeling of doing something good, feels good and one gets respect from others for it. And since "the victims" are portrayed as someone in need of assistance and help, someone who is per se innocent and good, being of assistance for "the victims", representing their views, which are otherwise not heard could never be offensive.

⁵⁸⁰ Interview with LRV, 5/3/2014.

⁵⁸¹ Interview with LRV I, 19/6/2014.

taken seriously by an international body ... well I think it has a certain effect at least that is what I hope for.”⁵⁸²

Even those (at The Hague), who were not as critical and disillusioned, formulate the ideal of justice for victims much more carefully and they constantly seem to justify the ideals before the interviewer and probably also before themselves:

“How can you deny a place to the only person that really deserves in the end, no? It is very abstract concept – fighting impunity and delivering justice but in the end when you look into practical terms, who is asking for justice? I think it maybe is the victims, no?”⁵⁸³

The notion of justice as accountability and ending impunity was complemented by the own notion of justice that was more individual:

“You can push for that and you know there is a good cause behind that and that you do something useful for justice and for the fight against impunity but also for the individual and I think in the end that is the most important, the fact that you have the big picture of that fight against impunity and justice and this individual dimension and it is the mixture of the two things that makes me passionate about what I am doing.”⁵⁸⁴

When asked about the benefits and challenges of victim participation for both the Court and the victims, it suddenly seemed to be self-evident why and how victims benefit from being granted the opportunity to “tell their story” and “being recognized as someone who suffered harm”⁵⁸⁵

“Well, for victims you can see them [benefits A/N] in an immediate way, like they are recognized as such is already something for them. Then you can also see of course there is like a feeling of justice is something that you will bring to them if the participation is meaningful and effective.”⁵⁸⁶

“Those moments that we shared individually with them are the ones which count the most for them. Because that is when, finally, they have this impression that they do exist, that they have somebody really caring about their very own case.”⁵⁸⁷

“Well yes, well many of them, because it is not similar, they are not similar, because they are all different people, but yes, for instance in Kenya there is, a year and a half ago at the end of a meeting with one, an interview with one victim, the person stood up and suddenly came back and sat down again and took my hand and tell me, wow, you know I did not mention that, but now I

⁵⁸² Interview with LRV, 5/3/2014.

⁵⁸³ Interview with LRVs, 25/6/2014 and 27/6/2014.

⁵⁸⁴ Interview with LRVs, 25/6/2014 and 27/6/2014.

⁵⁸⁵ While it seemed to not be so easy to describe why and how the Court benefits.

⁵⁸⁶ Interview with LRVs, 25/6/2014 and 27/6/2014.

⁵⁸⁷ Interview with LRV II, 19/6/2014.

spend an hour with you talking about what I went through and whatever is happening now, I am satisfied, because I, and that is what I was telling you before, it is not even my words, it is their words. Because this is part of my daily fight and now that I look, I could talk to you, I feel less heavy, because many things I was carrying on my shoulders alone, I know somebody is taking care of.”⁵⁸⁸

Despite the previously voiced doubts about the meaningfulness of truth and justice as foreseen by the ICC for the participating victims, legal representatives almost immediately resort to the benefits of individual encounters with them. Thereby, they “bring to them a feeling of justice, make them feel that they exist, because they know that somebody is taking care of the weight on the shoulders.” Somehow, we are still doing good seems to be the reassurance to continue with the work.

Narcissistic samaritanism “creates a feel good community experience, but elides the behind the scenes stage management.” (Ibid.) Hence, listening to the voices of victims is understood to be a justice delivered by the Court and its staff, which is exactly the reproduction of the narrative of truth and justice for victims and the empowering function of telling one’s story. This stands in peculiar contrast to what the representatives say about the time and possibility to meet victims individually – “the behind the scenes management”.⁵⁸⁹ While on the one hand emphasizing the importance of building trust and highlighting the effect of individual meetings for victims, they, on the other hand, describe how it is merely impossible to meet with all of the participants individually.⁵⁹⁰ They abstract from the instances of direct individual contact the notion of justice for victims through telling their story to legitimize their work and thereby implicitly also legitimize the Courts notion of justice. The moments of doubt and reflection, that I interpret through my theoretical lens as ghosts haunting the legitimizing discourses of the ICC, are closed.

These moments of doubt are caused by the feeling of a stark discrepancy between what the court can offer and the “reality of the victims”. These encounters with the “reality, when going there and speaking to them” is drastically described by most of the legal representatives⁵⁹¹ Almost all referred to these moments as the most

⁵⁸⁸ Interview with LRV II, 19/6/2014.

⁵⁸⁹ Interviews with LRVs, 16, 19, 20, 25, 27/6/2014.

⁵⁹⁰ Interviews with LRVs, 16, 19, 20, 25, 27/6/2014.

⁵⁹¹ Interview with LRV I, 19/6/2014.

important in their work and the urgency caused by the discrepancy between the *here* (The Hague) and the *there* (situation countries) causes many legal representatives to demand that “everyone should go *there*”.

But these moments of encounter are foreclosed through the practice of legal representation explored previously, when “the victims” are portrayed as in need of assistance, defined by the harm suffered which is pre-defined in legal terms and therefore always already represented within the legal narrative. This representation is naturalized in the legal narrative and interrupted by the direct encounter with the participating victims which renders this encounter crucial for the self-reflexive stance vis á vis the exclusionary violence inherent in legal practice. It is the feelings of urgency and despair facing the impossibilities of bridging the *here* and *there*, that should have a space within the legal proceedings because it is an expression of the lack within the symbolic order.

4. Embracing radical relationality

Until now, in this dissertation, the individual participating victims were described as the representatives of heterogeneity, diversity – the constructed others potentially destabilizing the integrity of the court of law. They are objectified to illustrate the exclusive practices of representation and participation and the irritations and spaces for opposition which are opened within the exclusive legal practices of defining subject positions such as “the victims” and the “relevant victim”, and the “(right) victim” – then closed again. In this last section, I want to describe two personal situations which irritated me and caused me to reflect on the hierarchical structuring of information collection within interview situations – within the direct encounter with individual victims. As already indicated the moments of irritation are very personal and subjective they are not necessarily representative. Nevertheless, I consider it important to describe this situation to show how a reflection process on the exclusionary violence inherent in legal proceedings of representation and subject formation might be triggered and how the encounter with individual participating victims might have such a subversive effect. Furthermore, just like representation within the institution of victim participation at the ICC, out of many individuals who caused me to feel the exclusions and impossibilities of the current practice, two

situations are selected – two “(right) victims” within my research. I chose these situations among other reasons because it is not the stereotypical situation where the mere description of extreme violence causes silence. Just like the previously described process of translation, I depended on my colleagues at Kituo to meet with individual victims, some of them participated in the proceedings, some did not and therefore belong to the group of “wrong victims”. They arranged contact to so called spokespersons, my colleagues called them gatekeepers to the victim community. These spokespersons then arranged meetings with themselves present and other persons from the community whom they considered representative. When I conducted interviews I was at once a researcher and a representative of Kituo *collecting information* necessary to organize a fundraising workshop and inform about the state of the proceedings at the Hague.

4.1. „I have a lot of reports“

One of these ‚work interviews‘ was introduced by my interview partner an internally displaced person because of the post-election violence in Kenya 2007/08 with the words:

„I have a lot of reports“⁵⁹²

While saying this he looked at me as if asking – which report do you need? Which of my stories do you want to – or need to hear? I had to think about this introduction a lot, and against the backdrop of post-colonial theory, I could interpret the bewilderment it caused. I refer to the situation in my conceptualization as revelation and subversive questioning.

‚I have a lot of reports‘ reveals that the interview situation is relational in a specific way, which is often obscured in the framing of interviews, especially in the framing of legal representational practices. Classically, as shown previously, interviews are framed as a situation where I, the interviewer am the active part who *collects information* from the passive victim. I collect – the other provides. Thereby, from a post-colonial perspective – the Western lawyer is the active collector of information from the periphery – the specific site of culture to translate it to the centre in order to right their wrongs for them – to deliver truth and justice.

⁵⁹² Field notes, 25/2/2014.

“I have a lot of reports” reveals that this is a fiction and subversively questioned the inherent naturalized hierarchy. This is what caused my bewilderment. He showed me, that he is the one who chooses the reports he wants to tell me. And he demonstrated that he knows that there are many *mzungus* (white persons) coming to *collect information* and not all of them need and therefore hear the same reports. This reveals the selectivity on both sides. I can only hear the information institutionally required and he will only tell me what he wants me to convey. The information is not just out *there* for me to be collected and translated – they are pre-selected by my interview partners. This turns the naturalized hierarchy upside down and thereby reveals that the representational practice is hierarchically structured. The situation that I, the Western lawyer, collect information from “the victim” who is willing to tell me anything I want to hear is discursively naturalized. I decide what I want to hear – “the victim” delivers the information.

I interpreted the bewilderment the statement ‘I have a lot of reports’ caused in me, as a short moment where my privileges were revealed as privileges, because I could not perceive of them as natural anymore. Thereby, the power of definition and interpretation was shifted. In this moment, he reversed the positions and took over control, demonstrating that he decides what to say and what to keep to himself. Which report he wants me to hear. What is being said and what is being heard. The story I tell, be it in my research, or at The Hague is co-constituted. Every attempt to control information, is always also an attempt to re-claim naturalized privileges of having the power of definition and interpretation.

The interview situation, just like the legal representational relationship is a moment of differential identity formation, where knowledge about the respective other is mutually constituted. From the institutional perspective this is where “the truth” about “the victim” is created. This relationship is structured by post-colonial images about the Other. Which, among others, implies the power of definition and interpretation from the periphery to the centre. The centre (the ICC) needs the periphery (the victim) to present itself as *in control*, as the institution that is able, through neutral operation, to find the truth and deliver justice, to those who are not able. This representation is a fiction which is constantly revealed by participants like my interview partner, the revelation has to be taken seriously.

4.2. Anger - resignation - silence

Another situation caused me to be ashamed of my ignorance and obtrusiveness. My interview partner repeatedly tried to tell me about a domestic court proceeding that a self-help group of women initiated. The court decided on a rape case in their neighborhood and the perpetrator was sent to live imprisonment which made her happy. She was working together with other rape-victims to support women and girls throughout the proceedings. When I asked her about the ICC cases, she ignored my questions and kept on talking about her cases. When the translator, who was a representative from Kituo working in one of the community justice centres, explained that the questions do not concern the Kenyan cases, but the ICC cases, she got angry. She said that she is bored with the proceedings at The Hague and asked: "For how long shall we follow up on these cases?" I could not answer and there was an uncomfortable silence between us. I had the impression that we both realized in this very moment, that I cannot hear her within my framework. Instead of trying to fit into the framework, she challenged it and this caused silence and resignation. My interview partner refused to be represented within my framework, which caused me to be ashamed of its exclusiveness. She refused to *return the gaze*, showing the one-sidedness of the gaze. She revealed the limitation inherent in the framework. In that moment, I was forced to question the framework that prevents me to hear what she wants to convey. Instead of being convinced that my legal knowledge is a privilege allowing me to represent the voices of "the victims", I conceived of this knowledge as a loss, inhibiting me to understand her.

As described in the Part II Chapter 4, silence plays an important role within post-colonial theory. Silence in the sense described above can be read as having a resisting potential within the hierarchical framework of speaking and hearing. Silence reveals the (im)possibilities of representation within the post-colonial episteme. This silence, in contrast to the silencing described in the previous chapters, can, if listened to, cause the questioning of own privileges, which is a pre-requisite to learn to listen (Castro Varela, Maria do Mar and Dhawan 2003, p. 279).

Taking this as a starting point, my interview situations and the bewilderment and shame, could be interpreted as an irritation through subversive revelation of the relatedness and the implied hierarchy. And instead of neglecting this moment to

subsequently regain control and reinstall the postcolonial hierarchy of definition and interpretation, these moments should be valued as irritations of the fixed images which reveal the implied naturalized violence in the legal practice of representation.

5. Educating “the victims” vs. learning to listen?

The representation of “the victims” and the “relevant victim” also frames the representatives relationships to their clients. In the LRVs search for the “(right) victim” they depend on native informants connecting the *here* and the *there*, the global and the local. The chain of translation between the representatives of the Court and the affected communities and the participating victims is very long and it is hierarchically framed. Since it is framed to bridge the unbridgeable gap between the binaries of *here* and *there*, the effects of the (im)possibilities inherent in the search are acted out by all those who are located in between. Those who are *in the middle of it*.⁵⁹³ They feel the urgency of proximity - the urgency of the excluded while constitutive others. The urgency of radical relationality. The resulting feelings of despair vis á vis the (im)possibilities - the ghost of the symbolic haunting victim participation in general - are silenced again by referring to own notions of justice for victims.

On an organizational level, the frustration is addressed by suggesting to improve the outreach in order to “built knowledge and manage expectations”:

“Early outreach should include a general description of what participation before the Court involves, the participation process and what victims who apply to participate can expect. Providing accurate information at an early stage will build knowledge and trust in the ICC, which is essential for victims to engage, and manage expectations. It is also essential to prevent frustration if progress in a situation or case is slow.”⁵⁹⁴

Organizational learning is described as educating the others to comply with the legal framework. The problematic of the practice of victim participation is perceived not to lie with the legal exclusionary practices but with those who are not able to understand the necessary limitations of such a framework. Organizational learning is

⁵⁹³ Interview with LRV I, 19/6/2014.

⁵⁹⁴ Independent Panel of Experts Report on Victim Participation at the International Criminal Court, 26 July 2013, <https://www.amnesty.org/en/documents/document/?indexNumber=IOR53%2f001%2f2013&language=en>. Last accessed 19/5/2018.

not learning to hear what is being expected, but educating the participants to just demand what can be delivered - to comply with the subject position of “the victims” without being frustrated by its limitations. Thereby the myth about meaningful participation can be rescued:

“Meaningful victim participation in ICC cases will remain a myth without more widespread victim education about the court, its processes, and its procedures. the legal process is complex and often disconnected from the needs and concerns of victims. More outreach and training is needed, particularly in rural regions, to ensure that victim participants understand their rights, their options for participation, and the limitations of the court’s mandate.”⁵⁹⁵

Instead of learning to listen and an understanding of own privileges as a loss preventing to hear the others’ knowledge, the others have to learn and their knowledge is questioned. The hierarchy is re-installed and the symbolic order re-iterated.

⁵⁹⁵ ‘The Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court Uganda, Democratic Republic of Congo, Kenya, Côte d’Ivoire, Human Rights Center UC Berkley School of Law, 2015, <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf>, last accessed 6/2/2018, p. 74.

Postlude: Listening to the Silence – Sensing the Noise

“Speech harbors silences; silences harbor meaning. When silence is broken by speech, new silences are fabricated and enforced; when speech ends, the ensuing silence carries meaning that can only be metaphorized by speech, thus producing the conviction that silence speaks.” (Brown 2005, p. 83)

In this dissertation, I wanted to speak the silences of the legitimizing narratives surrounding victim participation at the ICC and its manifestations in the organization of victim participation at the Court. I began by analyzing the images conveyed in the narratives framing the success story of victims and/in international criminal law, and demonstrated that, while there is a general development in acknowledging a role for victims within international proceedings, the depiction of victims did not change significantly. The image of the victims as emotional, subjective, partial and political is opposed to the image of criminal courts as factual, objective, impartial and unpolitical can be traced from the narratives at the time of Nuremberg, through the Eichmann trial, the ECCC to the ICC. The dichotomous image construction stabilizes the self-depiction of international criminal justice as “one of the most significant tributes that power has ever paid to reason.”⁵⁹⁶ This binary construction is also represented in the conception of retributive and restorative justice. Victim participation and the involvement of victims in general at the respective courts is negotiated under the restorative justice paradigm that is opposed to the retributive (criminal) legal paradigm. It is this theoretical and structural tension within which victim participation is located and negotiated. Consequently a *justice gap* is detected in the practical implementation which is then ascribed to the tension between the dichotomous conceptions of justice.

Then I argued that “the victims” play a crucial role in legitimizing international criminal law, thereby bridging the *justice gap* in the classical criminal legal theories. The victim’s rights to truth and justice, developed in human rights law, are referred to when elaborating on the positive effect trials can have on individuals and the respective societies. The so called therapeutic ethic is referred to as a legitimization of legal proceedings. But, just as described, the analysis of empirical experiences

⁵⁹⁶ Opening Statement before the International Military Tribunal Robert Jackson
<https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>. Last accessed on 29/5/2018.

debunks these noble goals once again. The *justice gap* seems to haunt international criminal courts.

This semblance lead over to the deconstructive theoretical approach towards truth and justice for victims and the therapeutic ethic that refrains from discussing victim participation within the binary of restorative and retributive justice.

In a first step, reading the gap in justification with Derrida suggested that it is inherent in the legal claim to find the truth and bring justice and that the very reference to these ideals as something tangible obscures the exclusionary violence of legal truth finding efforts. In a next step, the notion of the rational autonomous subject underlying the therapeutic ethic is analysed from a psychoanalytical Lacanian perspective. Thereby, the practices of the representation of victims could be read as effects of the epistemic violence inherent in the conceptualization of a subject position of “the victim” in the narratives that frame the relation between international criminal courts and victims. The mutually constituting images – that of the rational, sober, impartial and objective law and that of the irrational, emotional, partial and subjective victim – can only be uphold by excluding, representing and collectivizing the actual participants who would disturb this image. Furthermore, it is the “African victim” that is portrayed as the emotional, irrational representative of the lack which has to be closed by the rational Western legal court which brings truth and justice to those who are incapable of finding it by themselves. “The African Victim“ can thus serve to produce an image of trauma and violence which reproduces the image of a rational non-violent version of Western rule of law and courts *righting their wrong for them*.

All theoretical approaches develop what I called *(im)possible ethics*, indicating that the critique is the starting point to go beyond fixed understandings of justice, truth and the subject. The *beyonds* are located exactly within the (im)possibilities of justice and the identical subject. Building on these theoretical insights, I took the ethics of representation, ethics of listening and measuring and enduring silence as a starting point from which to empirically analyse the practice of participation and representation at the ICC. These ethical questioning of representational practices, of speaking and hearing and of the silencing effects of fixed subject positions within the

legal framework striving for *the* truth and *the* justice lead my empirical research and informed my questions.

Based on the data generated through organizational ethnography and the interpretative textual analysis, I showed that representation, collectivization and externalization are silencing practices naturalized referring to the mantra of *meaningful and effective* participation. The ghost of symbolic participation which would reveal the legitimatizing function of “the victims” and the interrelated dependency of the Court is foreclosed. In the practice of victim participation at the ICC a subject position of “the victims” is produced which is shaped in such a way that it always already confirms the self-legitimizing image of the ICC as deliverer of truth and justice. All participants potentially challenging these images are excluded as inappropriate. The dichotomies of rational - emotional, unpolitical- political etc are underlying the mutually constituting images. This image of the victims, as always already interested in ICC style truth and justice has the effect that the only interest that distinguishes “the victims” from other parties and the Chambers, is the harm suffered and the cultural background. The binary construction of the ICC and “the victims” informs the decisions shaping the subject position from which the participants can speak and are heard. As an emotional narrator of a general account of suffering, when presenting views and concerns in person.

I argue that the representational practices are hierarchical and reproduce the image of the benevolent Court of Western tradition (here) righting the wrongs of the others (there). The closer the participants come to the Court. the tighter are the control mechanisms to foreclose the encounter revealing the radical relationality. At the same time, the close proximity of legal representatives and their clients causes irritations within the *here and there* dichotomy. These irritations are acted out between narcissistic samaritanism and despair. Building on this finding I claim that feeling and sensing is crucial to listen to the silencing and silences within the practice of representation and participation. Feeling the urgency of proximity reveals the radical relatedness in the sense that the dependency of the ICC on “the victims” when it comes to self-legitimization and the (im)possibilities entailed become obvious.

The reader might have had the impulse, while reading, as I had while writing, to ask: “Well, but how else?” My point is not to suggest that the organization of victim

participation could function without exclusions. My point is, however, that the exclusions have to be revealed and analysed as exclusions and not always already framed as necessities for the sake of legal effectiveness. In order to make visible the inherent violence in the legal framing of who is relevant, the exclusions have to be dramatized - the silences spoken. Thereby, the inherent impossibilities in the legal endeavour for closure can be revealed, reflected and possibly addressed more sensitively. And, the practices of representation can be reflected, instead of being naturalized as self-evident. Within the practice of participation the ICCs own voice is imposed on the participants as “the victims” - therefore it is another form of absence and silence - not presence and voice.

Nevertheless, the *justice gap* is a potential, listening to the silence within the practice of participation one feels the noise of the excluded constitutive others. Embracing this relationality would imply to take the gaps seriously as always deferring and therefore as a producer of alternative, yet inextricable meaning. This goes to the very foundations of international criminal law - these foundations are always also non-foundations and the non is haunting all international courts. Instead of closing this foundational gap - it should be considered as a chance. The traumatic Real in international criminal law is the (non)foundation. It is the traumatic violence perpetrated to which one has to react. And it is the always already lacking reaction. It is the feeling of solidarity with victims - and it is the (im)possibility of understanding. Taking this as a starting point would require to listen to the silences within international criminal proceedings as a reminder of the (im)possibilities of justice.

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